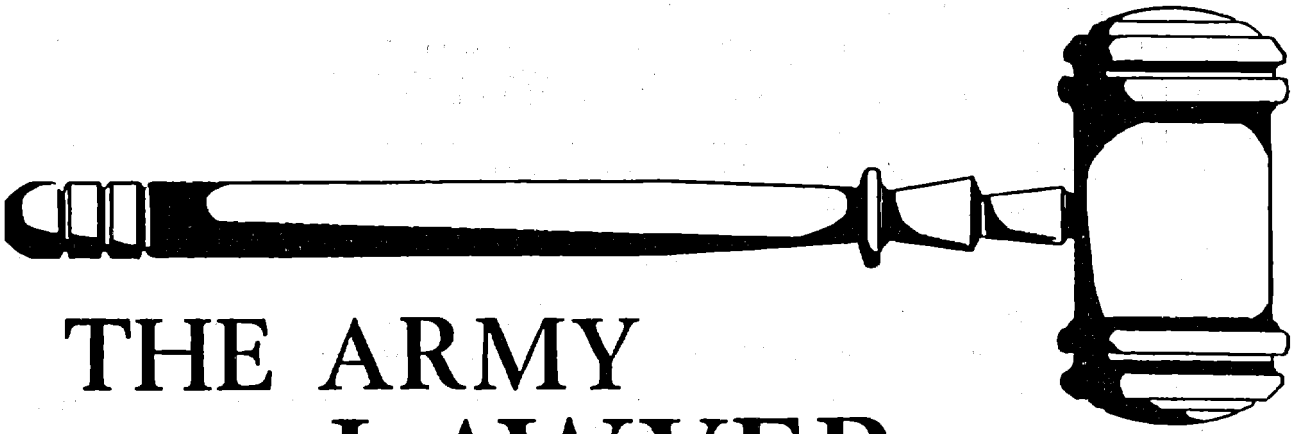

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Editor
Captain Benjamin T. Kash

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DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

30 July 1991

DAJA-ZA (27a)

MEMORANDUM FOR COMMAND AND STAFF JUDGE ADVOCATES

SUBJECT: Use of the Technical Channel of Communications - POLICY MEMORANDUM 91-3

1. A point I have emphasized in remarks during various travels and presentations is the use of our technical channel of communications. My purpose was to ensure that you in the field have immediate access to the collective knowledge and experience of senior intermediate judge advocates and OTJAG to assist in addressing sensitive or unusual legal issues that are presented to you.

2. I now wish to emphasize another important aspect of our technical channel of communications. It is to alert us here at HQDA when you become aware of sensitive or unusual matters with legal implications that reasonably could be expected to gain media attention if disclosed to the public, or are expected to be elevated through command channels for the attention of the Army's senior leadership. There have been some instances recently in which that has not happened. Therefore, this is to remind you that I expect such notification through supervisory channels to the Executive.

3. We, of course, cannot specify every instance in which notification would be required. I trust you will remain sensitive to this issue, however, and will exercise your judgment appropriately.

JOHN L. FUGH
Major General, USA
The Judge Advocate General

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

6 August 1991

DAJA-SC (600-50d)

MEMORANDUM FOR COMMAND AND STAFF JUDGE ADVOCATES
ETHICS COUNSELORS

SUBJECT: Advising Army Leaders on Financial Interests - POLICY MEMORANDUM 91-4

1. I am concerned with the quality of ethics advice and review of Financial Disclosure Reports (Standard Form (SF) 278) pertaining to general officers and senior executive service employees. The remedy for these concerns lies with your performance in fulfilling this essential and highly visible function.

2. The SF 278 assists our general officers and senior executive service personnel in evaluating their personal, professional and financial activities and interests to ensure that there are no conflicts with their public duties. You play a vital role in this process. First, you must ensure that every entry on the SF 278 is complete and unambiguous; an excess of information is preferred to too little. Fifty percent of the SF 278's filed in 1991 have required follow-up questions from OTJAG. Second, you must help Army leaders, especially those just building a portfolio, understand that financial interests in DoD contractors pose greater risks of conflicts of interest as they advance in grade and position, and that they may be forced, in the future, to divest themselves of the interest with less than favorable economic results. Finally, they must understand that the interests of their family members are treated as being their own.

3. I assure you that this subject is important to the Army leadership, and will be important to your present clients as they advance. Failure to be thorough today may cause embarrassment in the future when our lack of attention to detail has adverse personal consequences for a senior Army leader.

JOHN L. FUGH
Major General, USA
The Judge Advocate General

Doctors and the Distribution of Drugs

Major Henry R. Richmond, Chief, Criminal Law Division
Captain Daryle A. Jordon, Chief, Legal Assistance
Office of the Staff Judge Advocate, Fort Stewart, Georgia

Consider the familiar scenario in which a registered source (RS) informs the Criminal Investigation Command (CID) that a soldier is distributing drugs. The CID sends the RS to make one or more confidence buys. Then, an agent is introduced to the distributor and, if fortunate, the agent makes one or more buys before apprehending the soldier. Although this is the ideal drug case for trial counsel, it is a loser for defense counsel unless the RS or agent followed the accused around, begging an otherwise honest and criminally ill-disposed citizen to commit a crime and sell drugs.[1] These kinds of cases provide little variety for attorneys because they generally are considered the "ordinary" drug sale case and provide the typical scenario from which drug convictions occur. Variations on the "ordinary" drug case, however, provide the spice all advocates desire.

One possible variation from the ordinary drug distribution case may occur when the alleged distributor, because of his or her status, legally is authorized to distribute drugs. Physicians, in particular, lawfully prescribe controlled substances every day as a part of their normal treatment of patients. Considering the circumstances under which physicians might distribute drugs wrongfully, therefore, is conceptually difficult. Nevertheless, doctors occasionally distribute drugs illegally, and typically do so through the use of prescriptions.

Until the recent case of *United States v. Dallman*,[2] no reported military case has dealt with the wrongful distribution of drugs through the use of prescriptions. The purpose of this article is twofold. First, it reviews and analyzes the case of *Dallman*. Secondly, it provides trial and defense counsel with issues for consideration when confronted with a similar case. These issues include possible defenses, alternative and supplemental charging considerations, evidentiary issues, and practice pointers.

The Facts in *United States v. Dallman*

Major Dallman was Chief of the Psychiatric Clinic at Winn Army Community Hospital, Fort Stewart, Georgia. During his tenure there, he befriended two civilian employees of the hospital snack bar. Neither were entitled to military medical care. Beginning in July 1988, however, one of the employees asked Dr. Dallman to prescribe medication for a variety of real or perceived ailments. Over the next several months, Dr. Dallman wrote prescriptions to the individual for a variety of substances controlled under federal or state statutes including Talwin, valium, seconal-secobarbital, and Elavil. Additionally, he wrote prescriptions—also for controlled substances—for the other employee. At no time did Dr. Dallman perform any physical examination or other tests on either person prior to prescribing drugs. One of the employees paid Dr. Dallman for the prescriptions. Additionally, Dr. Dallman knew one of the employees abused drugs.[3]

At trial, Dr. Dallman pleaded guilty to forty-four specifications of wrongful distribution of drugs in violation of Uniform Code of Military Justice (UCMJ) article 112a,[4] three specifications of conduct unbecoming an officer in violation of UCMJ article 133,[5] and three specifications of wrongfully distributing state controlled drugs in violation of UCMJ article 134 through application of the Assimilative Crimes Act. He was sentenced to dismissal, confinement for twelve months, and forfeitures.[6]

Issues on Appeal

On appeal, the Army Court of Military Review addressed four main issues. On their face, all of the issues addressed the providence of the accused's guilty plea.[7] When analyzed, however, these issues provide a framework for the proper prosecution and defense of similar cases that may arise in the future.

Wrongful Distribution of Drugs

Article 112a proscribes, *inter alia*, the wrongful distribution of controlled substances.[8] The elements of the

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[1] *See generally* Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984], Rule for Courts-Martial 916(g) [hereinafter R.C.M.] (the military uses the subjective entrapment defense, which focuses on the accused's predisposition); United States v. Vanzandt, 14 M.J. 332 (C.M.A. 1982).

[2] United States v. Dallman, 32 M.J. 624 (A.C.M.R. 1991).

[3] *Id.* at 626.

[4] Uniform Code of Military Justice art. 112a, 10 U.S.C. § 912a (1982) [hereinafter UCMJ].

[5] These specifications included two specifications of dereliction and one specification of violating the standards of conduct. *See* Army Reg. 600-50, Standards of Conduct for Department of the Army Personnel, para. 2-4 (28 Jan. 1988) [hereinafter AR 600-50]; *Dallman*, 32 M.J. at 627.

[6] *Dallman*, 32 M.J. at 627.

[7] *Id.*

[8] *See* UCMJ art. 112a.

offense are: (1) that the accused distributed a certain amount of a controlled substance; and (2) that the distribution by the accused was wrongful.[9] A full understanding of the offense as it applies to doctors unlawfully writing prescriptions for the distribution of drugs requires the answer to two questions:

> (1) Can "distribution," as defined by the Manual for Courts-Martial (MCM), apply to a military physician who regularly dispenses medication by prescription?; and
>
> (2) What does "wrongful" mean as applied to the acts of a practicing physician?

While the court addressed the second issue,[10] it left for implication the answer to the first. For purposes of complete understanding, however, the answer to the first question should presage the answer to the second.

Because no military case prior to *Dallman* reported the conviction of a physician for the wrongful distribution of drugs by writing prescriptions, an issue of first impression naturally arose. Ordinarily, when military law is silent on an issue, the courts will consider other bodies of law as persuasive authority in determining what the military's stance should be. In *United States v. Byrd*,[11] however, the Court of Military Appeals simplified the search for authority in the absence of a military rule. In *Byrd* the court noted that courts-martial will "apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts" to the extent those principles and rules are not otherwise inconsistent with the Manual for Courts-Martial.[12] Accordingly, in the absence of a military rule on an issue, military courts should follow the federal rule as long as it is not otherwise inconsistent with the Manual.[13] The issue of whether distribution can occur through the use of prescriptions requires this application of federal law.

Distribution

Article 112a defines "distribute" as delivering to another.[14] "Deliver" means the actual, constructive, or attempted transfer of an item.[15] While article 112a does not address the issue of whether writing a prescription constitutes distribution, article 112a mirrors its federal counterpart[16] and federal courts have addressed the issue.[17]

The case that speaks most directly to the use of a prescription as a means of distribution is *United States v. Davis*.[18] Dr. Davis was convicted of unlawfully distributing various controlled substances by means of writing prescriptions on twenty different occasions.[19] As a predicate to affirming the conviction, the United States Court of Appeals for the Ninth Circuit first noted that "distribute" means—just as in the military—to deliver a controlled substance or to effect the actual, constructive, or attempted transfer of a controlled substance.[20] The court determined that when a doctor prescribes a medication outside the legitimate practice of medicine, he or she initiates a criminal transfer of a controlled substance. The court further concluded, "It follows that by creating the means by which controlled substances can be transferred, a doctor 'distributes' within the meaning of 21 U.S.C. 841(a) by the act of writing a prescription outside the usual course of medical practice and not for legitimate purpose."[21] Accordingly, for purposes of federal criminal law, as applied to the military by the absence of military interpretive case law and in light of the *Byrd* decision, a doctor can "distribute" when he or she uses a prescription to initiate the transfer of a controlled substance.

Wrongfulness

As federal case law demonstrates—and as the *Dallman* court properly presumed—distribution can occur by

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[9] MCM, 1984, Part IV, para. 37(b)(3).

[10] *Dallman*, 32 M.J. at 628.

[11] 24 M.J. 286, 292 (C.M.A. 1987) (citing UCMJ art. 36).

[12] *Id.* (citing UCMJ art. 36). The *Byrd* court ruled that the defense of voluntary abandonment applied to courts-martial because the defense had gained "increasing acceptance in federal criminal trials." *Id.*

[13] By analogy, *Byrd* indicates that if the federal definition of "distribution" in drug cases encompasses the case of a doctor distributing drugs, courts-martial should apply that definition as long as it is not contrary to the definition appearing in the Manual for Courts-Martial.

[14] MCM, 1984, Part IV, para. 37c(3).

[15] *Id. See generally* United States v. Tuero, 26 M.J. 106 (C.M.A. 1988); United States v. Sorrell, 23 M.J. 122 (C.M.A. 1986).

[16] MCM, 1984, para. 37(3) analysis, app. 21, at A21-94. The patterning of article 112a to its federal counterpart is explained further by example in the analysis. *See id.*

[17] United States v. Davis, 564 F.2d 840 (9th Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978).

[18] *Id.*

[19] *Id.*

[20] *Id.* at 844.

[21] *Id.* at 845.

means of writing a prescription. Accordingly, the next question is, what constitutes wrongful conduct by a physician?

The court in *Dallman* first noted that the Manual for Courts-Martial provides that distribution of a controlled substance by medical personnel in the performance of their duties is not wrongful.[22] Next, recognizing that the military had not dealt with what *does* constitute wrongfulness on the part of physicians, the court turned its attention to the Supreme Court decision in *United States v. Moore*.[23] *Moore* defined wrongfulness in the inverse, stating that *lawful* acts are acts "within the usual course of a professional practice and in accordance with a standard of medical practice generally recognized and accepted in the United States."[24] The *Dallman* court correctly relied on *Moore* and adopted its standard for military practice. The *Dallman* court, however, gave conclusory treatment to *Moore* in one paragraph.[25] Accordingly, because the *Dallman* decision does not apprise the practitioner adequately of the full nature of the *Moore* standard of wrongfulness, the *Moore* standard requires further elaboration.

A multicount indictment charged Dr. Moore with unlawfully distributing controlled substances in violation of 21 U.S.C section 841(a)(1)—the federal counterpart to article 112a.[26] Dr. Moore prescribed methadone for drug addicts. After perfunctory examinations, he wrote prescriptions for the drugs and charged fees according to the quantity of drug prescribed.

Dr. Moore defended on two bases. First, he asserted that the proscription of section 841(a)(1), which prohibits "any person" from distributing, excluded him as a physician registered under the act and authorized him to prescribe medications.[27] Additionally, he noted that registrants under the act were subject to different prescriptions with lesser penalties. Accordingly, he asserted that he also was protected from prosecution under the "any person" provision of section 841 because of his status as a registrant.[28]

The Court found the prosecution of doctors under section 841 to be cognizable under the law.[29] More importantly for the military practitioner, however, the Court endorsed the prosecution of physicians for the unlawful distribution of drugs "if and when their activities fell outside the usual course of professional practice and were not for legitimate medical purpose."[30]

The question that results from this rather nebulous standard is: What constitutes conduct outside the usual course of professional conduct? In *Moore* the facts revealed inadequate or nonexistent physical examinations, no patient history taken, no record of amounts prescribed, no regulation or guidance regarding dosage, no precaution against misuse, prescriptions written whenever solicited, and fees graduated according to the amount of drugs prescribed.[31] Against this backdrop, the jury in *Moore* apparently had at its disposal fairly specific and objective guidelines regarding the treatment of drug addicts.[32] Given these facts, the jury reasonably concluded that Dr. Moore acted outside the usual course of professional conduct and not for legitimate medical purpose.

By contrast, during Dr. Dallman's guilty plea inquiry, he admitted that he was derelict in not performing a physical examination or performing certain tests prior to prescribing the drugs.[33] Accordingly, the Court of Military Review found: (1) the plea permissible,[34] thus adopting the *Moore* standard for military practice; and (2) that Dr. Dallman's pleas were provident because he willfully failed to comply with acceptable standards of medical or military practice.[35]

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[22] *Dallman*, 32 M.J. at 629; *See* MCM, 1984, Part IV, para. 37c(5)(B).

[23] *Dallman*, 32 M.J. at 629; United States v. Moore, 423 U.S. 122 (1975).

[24] *Moore*, 423 U.S. at 139.

[25] *Dallman*, 32 M.J. at 629.

[26] *Moore*, 423 U.S. at 122.

[27] *Id.* Registration of physicians with the Drug Enforcement Administration is a requirement of 21 U.S.C. § 822 (1988). This article will not address the registration aspects of the practice of medicine nor its applicability to military practice.

[28] *Moore*, 423 U.S. at 131.

[29] *Id.*

[30] *Id.* The opinion of the Court speaks primarily in terms of a physician's conduct falling outside of the usual course of professional practice and makes separate reference to the portion of the standard dealing with a lack of legitimate medical purpose in distributing drugs. *Id.* at 135. Cases that use this standard quickly started connecting the two phrases. *See, e.g.*, United States v. Rogers, 609 F.2d 834 (5th Cir. 1980). In a strict sense, the first part of the standard—that is, "outside the usual course of professional practice"—implies the second standard of "not for legitimate medical purpose." In other words, if a physician prescribes drugs without legitimate medical purpose, he acts outside the course of usual professional practice. Actually, practitioners must recognize and deal with the evidentiary distinctions between the two standards.

[31] *Moore*, 423 U.S. at 132, 143.

[32] *Id.* at 125-26.

[33] *Dallman*, 32 M.J. at 627.

[34] *Id.* at 629.

[35] *Id.*

The *Dallman* court noted the adoption of the *Moore* standard in several federal circuits.[36] In addition to the cases cited in *Dallman*, however, a variety of other reported federal cases also have dealt with the issue of what constitutes conduct outside the usual course of professional conduct and not for legitimate medical purpose. These cases provide trial advocates with a number of instructive and illustrative points.

In *United States v. Rogers*[37] the evidence showed that Dr. Rogers prescribed valium to a government agent on three different occasions without conducting a physical examination. Additionally, the substance prescribed had no apparent curative property regarding the malady complained of by the agent. That evidence, standing largely alone, supported a conclusion that the doctor acted outside the usual course of professional practice and without legitimate medical purpose. Perhaps more significantly, the court defined the kind of evidence necessary to sustain a conviction. The presence of expert testimony on the issue notwithstanding, the court concluded that legitimate medical purpose *need not* be the subject of expert testimony. Rather, the testimony of lay witnesses regarding the facts and circumstances surrounding the receipt of the prescriptions provided an acceptable basis to conclude that Dr. Rogers acted outside the usual course of professional conduct and not for legitimate medical purpose.[38] Accordingly, a witness could testify about the lack of physical examinations, patient history, and other precautions; and a jury could conclude, independent of any expert evaluation, whether those facts amounted to conduct outside the usual course of professional conduct and not for legitimate medical purpose.

In *United States v. Dunbar*[39] the government charged Dr. Dunbar with five counts of unlawful distribution in violation of 21 U.S.C. section 841(a)(1). An undercover agent complained to Dr. Dunbar of "subjective" ailments, whereupon Dr. Dunbar wrote, without a physical examination, prescriptions for drugs that were not appropriate for the malady of which he complained. On one occasion, the agent told Dunbar that he was not sick, but only wanted the drugs for resale.[40] The court concluded that the evidence sufficiently established that the doctor's actions were not in the usual course of medical practice and, therefore, were sufficient to support a conviction.[41]

In the trial of even the most clear case of this nature, counsel should be prepared to call, examine, and cross-examine medical experts to recite that the accused's conduct either was or was not in the regular course of practice and for legitimate medical purpose. Although not absolutely required to present expert testimony either to support a conviction or support a defense,[42] this type of testimony is, nevertheless, extremely important. No trial counsel should attempt to convict solely on bare and unevaluated facts when the defense calls experts to testify that those facts demonstrate—even marginally—legitimate medical purpose and actions within the usual course of professional practice. Because counsel may expect experts for either side to reach opposite conclusions on the same facts, counsel specifically should be prepared to cross-examine experts with conflicting opinions. In the final analysis, of course, whether a doctor acted outside the normal scope of practice and for other than legitimate medical purpose is a question to be decided by the finder of fact after weighing all the evidence.

An excellent case that helps illustrate the use of conflicting expert testimony is *United States v. Kirk*.[43] The trial court convicted Dr. Kirk of forty-eight counts of unlawful distribution in violation of 21 U.S.C. section 841(a)(1).[44] During the trial, two physicians testified for the government, concluding finally that Dr. Kirk's prescriptions for weight loss drugs served no legitimate medical purpose, and that these acts were outside the ordinary course of medical practice. During their testimony, these doctors provided a lengthy list of steps that the prudent physician should take before prescribing these types of drugs. Among those steps were: (1) take a medical history; (2) perform a medical examination to include weight and blood pressure; (3) ascertain from the patient the nature and extent of the supposed malady; (4) question the patient about any allergies in general and to particular medications specifically; (5) ask what other medications the patient was taking at the time; (6) ask if the patient suffers from any chronic maladies and to what

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[36] *Id.*

[37] 609 F.2d 834 (5th Cir. 1980).

[38] *Id.* at 839.

[39] 614 F.2d 39 (5th Cir. 1980).

[40] *Id.* at 42.

[41] *Id.* Counsel should be wary of relying on headnotes when citing cases. In this case, for example, the West reporter headnote stated that failure to conduct a physical examination before issuing a prescription amounted to conduct outside the usual course of medical practice. While the facts arguably may suffice—a conclusion that arguably is inferred from *Moore*—the *Dunbar* case included facts substantially in excess of the facts that the headnote asserted as being sufficient.

[42] *Rogers*, 609 F.2d 834.

[43] 584 F.2d 773 (6th Cir. 1978), *cert. denied*, 439 U.S. 1048 (1978).

[44] *Id.* at 774.

extent; and (7) ask if the patient was advised of the potential side effects and dangers of particular drugs.[45]

Generally, after properly qualifying an expert,[46] these are questions appropriately asked before the expert renders a conclusion. The answers to these questions should form the basis of the expert's conclusion that a physician's actions were or were not outside the usual scope of professional practice and without legitimate medical purpose.

In the trial of a military physician, tangential conduct of the physician also may bear relevance on the issue of action outside the usual course of professional practice and without legitimate medical purpose. For example, Health Services Command administratively regulates the manner in which doctors practice medicine.[47] A showing that the doctor acted within or outside the bounds of administrative acceptability may weigh on the issue of what constitutes the usual course of professional practice for a military physician. Additionally, military physicians are limited to treating only patients who are authorized care.[48] Evidence that a physician treated persons not authorized military medical care and having no connection with the military would indicate that he or she took action outside the usual course of professional practice.

Another indicator of whether a military physician is acting within the usual course of professional conduct lies in the area of credentials. Upon reporting for duty in a military hospital, a physician's education and experience is reviewed and he or she receives credentials to practice in appropriate areas.[49] Evidence that a physician prescribed controlled substances for alleged maladies outside the scope of his or her credentials arguably may result in the conclusion that the physician is acting outside the usual course of professional practice.

Note also that military physicians avoid host state licensing requirements by virtue of practicing in the military, in a military facility, and on authorized patients.[50] If they prescribe for nonauthorized patients, any violation of article 112a notwithstanding, they also may be practicing medicine without a license under state law.

An expert may conclude that the accused's failure to perform one or more of the steps listed above indicates that the accused did not act properly. The conclusions of the experts, however, are only as valid as the facts upon which they predicate those conclusions. In *Kirk* the accused generally failed to perform any of the steps associated with civilian medical practice. Nevertheless, the defense presented four doctors who, in varying degrees, all concluded that the accused's conduct was acceptable medical practice.[51]

Consequently, in the final analysis and with experts having offset each other's conclusions to one degree or another, lay perception of what medical doctors ought to do before writing prescriptions for controlled substances likely will decide the case. For trial counsel, the task is clear. Place before the panel all the steps that *should* or *ought to* predicate prescribing scheduled drugs. Then, with meticulous care, detail the failure of the physician to take all those steps. Argue that, regardless of any conclusions rendered by experts for either side, the failure to follow the prudent path amounts to conduct outside the course of professional practice. Argue further that, because of the failure to take the required preparatory steps, the doctor could not ascertain properly a legitimate medical purpose for the drugs prescribed. Finally, argue that in the absence of a medical doctor's specific determination that a legitimate medical purpose indicated a need to prescribe the drug, no legitimate medical purpose actually existed.

For defense counsel, the task is equally clear. Establish for the finder of fact *not* which steps could or ought to occur, but which steps *must* occur before the prescription of scheduled drugs is appropriate. Realizing, of course, that no "book" says what *must* be done, necessity forces the defense counsel to rely on the conclusory testimony of experts.

Accordingly, a dichotomy exists between the methods trial and defense counsel use their experts. For trial counsel, the primary benefit of the expert is not in showing that actions of the accused were outside the usual scope of professional conduct and without legitimate medical purpose—even though that conclusion almost certainly would strengthen the government's case. Rather, it lies in defining the "should" and "ought to" steps that a reasonable doctor takes. The jury or panel then must be led to conclude that the accused's failure to take all of those

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[45] *Id.* at 785.

[46] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 702 [hereinafter Mil. R. Evid.]. *See* Criminal Law Division, The Judge Advocate General's School, U.S. Army, Trial Counsel and Defense Counsel Handbook, para. 4-14 (1 Feb. 1990) (provides a sample for qualifying a psychiatrist as an expert easily modifiable for any medical expert).

[47] *See* Army Reg. 40-1, Composition, Mission, and Functions of the Army Medical Department, para. 2-2 (1 July 1983).

[48] Army Reg. 40-3, Medical, Dental, and Veterinary Care, chap. 4 (15 Feb. 1985).

[49] Army Reg. 40-68, Quality Assurance Administration, chap. 4 (20 Dec. 1989).

[50] *Id.*, chap. 9.

[51] *Kirk*, 584 F.2d 773.

steps demonstrates that his or her conduct was wrongful beyond reasonable doubt. Defense counsel, on the other hand, must place more reliance on the experts' conclusions. The defense must establish by expert testimony that, if the "must" steps occurred, the accused's actions were within the scope of professional practice.

Counsel should keep in mind one other point. The test for wrongfulness—that is, outside the usual scope of professional practice and without legitimate medical purpose—can be a two part-test, at least in a practical evidentiary sense.[52] Establishing the sequence of events prior to the delivery of the prescription addresses the "usual scope of professional practice" issue. The presence or absence of a legitimate medical purpose for the medication prescribed is the second part of the test. A physician can perform an examination that includes all necessary tests, take a complete history, and complete other "prudent" steps. If, however, he or she prescribes "uppers" for a speed freak with a hangnail, the doctor nevertheless has violated the law.[53] Without a legitimate medical purpose, writing a prescription falls outside the usual scope of professional practice.

Alternate and Supplemental Offenses

When confronted with a military physician who wrongfully has prescribed controlled substances in violation of article 112a, the command may ask what else, if anything, can be charged and prosecuted successfully. A further analysis of *Dallman* provides some of the answers.

Conduct Unbecoming an Officer and a Gentleman

Dr. Dallman pleaded guilty to three specifications of conduct unbecoming an officer and a gentleman in violation of article 133. On appeal he challenged the providence of those pleas.[54] Two of the specifications alleged that Dr. Dallman was derelict in the performance of his duties as a psychiatrist by negligently and willfully failing to perform physical examinations on the two persons for whom he wrongfully prescribed controlled substances. The third specification alleged that he disobeyed Army Regulation (AR) 600-50, a lawful general regulation, by wrongfully using government facilities and property for other than official purposes—that is, wrongfully writing prescriptions while on duty in a military hospital using government prescription pads.

In deciding the issue favorably for the government, the court provided an overview regarding conduct unbecoming an officer and gentleman from two standpoints: (1) pleadings; and (2) what must be elicited from the accused during a plea inquiry.[55]

The court first noted that a pleading must allege conduct that, without being facially innocuous, reasonably can be found to constitute conduct unbecoming an officer and a gentleman.[56] The court then provided examples, stating that acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, and cruelty all amount to conduct unbecoming an officer and a gentleman. The court cautioned, however, that minor derelictions, though

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[52] Courts have held that no difference exists between the phrases "in the usual course of professional practice" and "legitimate medical purpose." *Id.* at 784. In a substantive sense, that is true; however, in an evidentiary or "what it takes to prove a case" sense, it is only partially true. Accordingly, the key phrase to remember here is "in a practical evidentiary sense." *See also supra* note 30.

[53] A suggested instruction on wrongfulness to supplement the instruction appearing in the Military Judges' Benchbook, Dep't of Army, Pam. 27-9, para. 3-76.3b (May 1982), is:

> In the case of a physician, wrongful means that the distribution was accomplished outside the usual course of professional practice and without legitimate medical purpose. This phrase is not further defined and it is for you to determine whether the accused acted outside the usual course of professional practice and without legitimate medical purpose. However, you may consider the presence or absence of the following evidence as bearing on that determination:
>
> (1) whether the accused did any of the following prior to the prescriptions being written:
>
> a. take a medical history;
>
> b. perform medical examination to include weight and blood pressure;
>
> c. ascertain from the patient the nature and extent of the supposed malady;
>
> d. question the patient about any allergies in general and any allergies to particular medications specifically;
>
> e. question the patient on other medications he or she was taking at the time;
>
> f. asking the patient if he or she suffers any chronic maladies and to what extent;
>
> g. advising the patient of the potential side-effects and dangers of particular drugs.
>
> (2) whether the accused wrote prescriptions to persons authorized to receive his services as a military doctor;
>
> (3) whether the accused was credentialed by the medical facility to treat the supposed malady; and
>
> (4) whether, and how much, money or other consideration was exchanged.
>
> The list provided herein is not exclusive. You may consider any of the evidence given here that you consider relevant on the issue.

[54] *Dallman*, 32 M.J. at 627.

[55] *Id.* at 627-28.

[56] *Id.* at 628.

otherwise criminal, do not amount to violations of article 133. The test, the court noted, was not whether the conduct amounts to an offense, but whether the conduct constitutes a serious breach of the standards of morality and integrity.[57]

Applying these criteria to the specifications alleging dereliction for failure to perform physical examinations, the court found four factors supporting Dr. Dallman's plea to conduct unbecoming an officer and a gentleman.[58] First, a doctor's prescribing controlled substances without first performing a physical examination warranted a conclusion that the offense was serious. Second, the length of time over which the medications were prescribed—ten months—increased the likelihood for harm and demonstrated a disregard for the consequences of the acts. Third, the conduct potentially had a negative impact on the military community, which would be apprised that military doctors occasionally fail to adhere to proper medical standards. Fourth, the accused's receipt of money in exchange for the unlawful prescriptions was criminal misconduct. Finally, in addressing the specification that alleged a violation of AR 600-50, the court found the use of government facilities and prescription pads dishonest, self-aggrandizing, and an abuse of position.[59]

For future cases, the implications and requirements are clear. Counsel first must analyze the specifications to ensure they allege serious[60] acts of misconduct—not merely facially innocuous or minor acts of misconduct. Second, counsel should be prepared to argue the factual matters that make the conduct dishonorable. In guilty plea cases, counsel should ensure that a sufficient inquiry is made to establish the requisite factual predicate for the accused's plea.[61]

Because of the complexities of article 133 misconduct, trial counsel should assess the strength of other potential charges before preferral. Will the accused actually face the likelihood of greater punishment if convicted of article 133 specifications? What additional burden on time and resources will result from prosecuting article 133 charges? In short, trial counsel must ascertain whether the added burdens of charging and proving article 133 specifications, as well as protecting the record against attack on appeal, are worthwhile.

Assimilative Crimes

Several specifications in *Dallman* alleged the wrongful distribution of dangerous drugs scheduled by state statute in violation of article 134 as assimilated by 18 U.S.C. section 13.[62] On appeal, the defense challenged the providence of these pleas on the basis that the court-martial's jurisdiction over the offenses was not proven adequately. Dr. Dallman correctly argued that in a prosecution under the Assimilative Crimes Act, the government must prove exclusive or concurrent legislative jurisdiction over the place where the offense occurred. The court, however, resolved the issue in favor of the government, noting that a guilty plea admits the requisite jurisdictional elements as part of the plea inquiry.[63]

Trial counsel in *Dallman* benefited considerably from the doctor's plea. All too frequently, proving jurisdiction over Assimilative Crimes Act specifications occurs as an afterthought, if at all. While a guilty plea admits the jurisdictional element,[64] the easiest way to lose a contested specification of this sort is to forget to prove jurisdiction. As a consequence, anytime a charge involves violation of the Assimilative Crimes Act, the trial counsel should note the necessity of proving jurisdiction. The potential alternative is severe embarrassment.

Although not raised by the defense on appeal, the court in *Dallman* addressed one other issue regarding the specifications charged under the Assimilative Crimes Act.[65] Out of an abundance of caution and using the age old crutch "when in doubt, charge all about," the government overcharged the specifications regarding distribution of dangerous drugs scheduled by state statute. Specifically, the government alleged that Dr. Dallman

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[57] *Id.*

[58] *Id.* at 628-29.

[59] *Id.*

[60] *Id.* The court failed to define further what amounts to "serious" misconduct. For purposes of argument, however, "serious" as defined by article 134 is any offense punishable by confinement for a term exceeding one year. MCM, 1984, Part IV, para. 95b. "Serious can also be defined as an offense for which the maximum punishment includes a punitive discharge. *Id.*, para. 1e.

[61] *Dallman*, 32 M.J. at 627.

[62] MCM, 1984, Part IV, para. 60c(4)(c)(ii).

[63] *Dallman*, 32 M.J. at 630. Note that the court failed to consider whether the preemption doctrine impacted on these specifications but, by implication, concluded that it did not. When charging in this manner, however, trial counsel should be prepared to face a defense challenge based upon preemption. *See* MCM, 1984, Part IV, para. 60c(5)(a); *see also* United States v. Reichenbach, 29 M.J. 128 (C.M.A. 1989).

[64] *Dallman*, 32 M.J. at 630.

[65] *Id.*

wrongfully distributed "dangerous drugs (Elavil and Thioridazine) in violation of section 16-13-72 of the Official Code of Georgia Annotated, as assimilated by Title 18 United States Code, Section 13, such conduct being prejudicial to good order and discipline in the armed forces."[66]

As noted by the court in *Dallman*, the specifications, as worded, were sufficient to allege violations of either the first or third clause of article 134 and the government need not have alleged both.[67] As it happened, the government's error proved fruitful. When the military judge conducted the plea inquiry with the accused, he made a sufficient inquiry on the Assimilative Crimes Act, but inquired insufficiently on the prejudice to good order and discipline clause. Accordingly, the appeals court affirmed only so much of the findings as applied to the Assimilative Crimes violations, and set aside and dismissed the portions of the specifications that alleged prejudice to good order and discipline.[68]

The Assimilative Crimes Act issues in *Dallman* provide several important lessons for the practitioner. Article 134 provides alternate means of charging. When faced with violation of state law, however, charging the offense as a violation of the Assimilative Crimes Act under clause three of article 134 is impossible. On the other hand, the same crime may be charged as a violation of clause one of article 134, which proscribes conduct to the prejudice of good order and discipline. Further, the crime could be charged as bringing discredit upon the armed forces under clause two of article 134.[69]

In addition, the same crime can be charged in the alternative—as in *Dallman*—as a violation of more than one clause of article 134.[70] In *Dallman* this occurred through sheer inadvertence, but the facts in a given case conceivably might warrant alternative charging. Prudence suggests, however, that counsel not take on any more proof requirements than are necessary. Charging under clause three of article 134—the Assimilative Crimes Act—provides more objective standards of proof because trial counsel need not attempt to prove how the conduct was prejudicial under clause one or service discrediting under clause two. Instead, the government only has to prove that a violation of state law occurred in an area of exclusive or concurrent federal jurisdiction.[71]

Additional Matters for the Government

The burden of proving guilt is always on the government. Trial counsel in *Dallman* was fortunate that Dr. Dallman elected to plead guilty. The government in *Dallman*, however, appeared to complicate the case unnecessarily by charging a variety of crimes—violations of articles 112a, 133, and 134—some of which overlapped factually.[72] Because *Dallman* was an unusual case with issues that had not been addressed either by counsel or the military generally, the government had a tendency to charge everything possible so that if a loss occurred in one area, it could be recouped in another. Charging in this manner allowed the defense an opportunity to plead to some charges while not pleading to others.

Even though the government appeared to have overcharged in *Dallman*, cases in which a doctor is alleged to have dispensed prescription drugs wrongfully provide frequent opportunities to charge offenses in addition to the ones to which Dr. Dallman pleaded guilty. For example, consider the situation in which a doctor who is not licensed to practice medicine in the installation's host state writes a prescription to an unauthorized person. If federal jurisdiction is concurrent, this conduct could constitute an article 134 violation for practicing medicine without a license.[73] On the other hand, if a doctor uses duty time to treat unauthorized civilians, he or she may be guilty of dereliction of duty.[74] In addition, a case for dereliction is possible by establishing the list of predicate steps that should be accomplished before prescribing drugs, and demonstrating the doctor's failure to accomplish those steps.[75] Accordingly, the government not only would prove a prima facie case of dereliction, but also would establish the "outside the course of professional practice" test for wrongfulness under article 112a.[76]

The potential problem with "creative" charging, however, is confusion. The trial counsel who presents a charge sheet of many pages containing a myriad of charges based on the same facts, but having differing elements, likely will confuse the case. Prudence suggests

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[66] *Id.*

[67] *Id.*

[68] *Id.* at 633.

[69] MCM, 1984, Part IV, para. 60c.

[70] *Dallman*, 32 M.J. at 630 n.6.

[71] MCM, 1984, Part IV, para. 60c.

[72] *Dallman*, 32 M.J. at 626.

[73] In the circumstances described, the charge would allege a violation of article 134 as assimilated by 18 U.S.C. § 13 (1988).

[74] *See generally* UCMJ art. 92.

[75] *See supra* notes 43-50.

[76] *Moore*, 423 U.S. at 122.

that the trial counsel stay close to the core of the case, charging only the offenses that are at the heart of the misconduct and the offenses that are easiest to prove.

Additional Matters for the Defense

A fact situation similar to *Dallman* is much more difficult for the defense than for the government. The options available to the defense are limited, but nevertheless significant.

The first line of defense may be the accused's own testimony. Whether the accused testifies and subjects himself or herself to cross-examination is always an important decision. When the government can prove that the accused wrote improper prescriptions and can demonstrate that the doctor took few, if any, of the prudent predicate steps prior to writing those prescriptions, the accused's intent when taking or failing to take those actions is critical, making his or her testimony vital to the defense case. The accused may be able to convince the court that the steps leading up to the writing of the prescriptions may have been barely adequate, misguided, or the result of inexperience or great experience, but that the steps definitely were not criminal.[77] Additionally, the physician likely will insist that the steps taken were, in his or her opinion at the time, sufficient to warrant the issuance of the prescription.

The defense also will want to find another doctor to testify as an expert that the conduct of the accused was within the usual scope of professional practice and for legitimate medical purpose. The defense will want to argue that the distribution actually took place, but that the accused acted within the usual course of professional practice and lacked the general criminal intent required for conviction.[78]

Additionally, the defense may seek to establish that the accused did not receive any money or other consideration as a result of the transaction. The issue of motive, though not an element of the offense,[79] may be a critical key to the case. The receipt of anything of value in return for an improper prescription will be persuasive in inferring criminal intent and must be addressed head-on by the defense. In *Dallman*, for instance, money did change hands, but the amount was minimal.[80] If the case had been contested, the defense could have argued that because the exchange of money was relatively insignificant, Dr. Dallman certainly did not write the prescriptions for profit, but rather accepted the money for a professional appearance. Also, the defense should present good military character evidence[81] to persuade the trier of fact that the accused did not possess the criminal intent required even though some money was exchanged.

Another avenue of defense may be to shift the focus of the trial by denying intent and by suggesting to the court-martial that every doctor in the hospital is culpable because the accused only did what other doctors do routinely. This tactic attempts to demonstrate that the hospital's standard of medical inquiry is uniformly lax, and then uses the evidence of substandard practices as a means of establishing an inference that the accused lacked criminal intent.[82] Care should be taken, however, in using this approach. Aside from the possibility of panel backlash, the trial counsel may have investigated this aspect of the case at an early stage and have rebuttal evidence available.

Apart from general considerations on the defense of these cases, the *Dallman* opinion provides additional considerations for the defense. For example, if the accused is charged under article 134 with distributing dangerous drugs scheduled by state statute, counsel should investigate whether the standard of wrongfulness under state law is the same or different from the standard applied in federal and military courts.[83] The unwary trial counsel may assume mistakenly that the same standard applies. If incorrect, however, defense investigation of the issue will place government counsel at a distinct advantage. Similarly, state law may differ from federal law on whether wrongful distribution may be accomplished through the use of prescriptions.[84]

The accused may be charged with practicing medicine without a license under state law if he or she prescribed medications to unauthorized persons.[85] The manner of charging this type of misconduct is critical. If the specification under article 134 alleged prejudice to good order and discipline, the *Dallman* opinion provides the manner of defense. The *Dallman* court stated that such conduct "would not necessarily prejudice good order and discipline in the armed forces. Not every violation of local law prejudices good order and discipline."[86] Accord-

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[77] MCM, 1984, Part IV, para. 37c(5).

[78] *Id.*

[79] MCM, 1984, Part IV, para. 37b.

[80] *Dallman*, 32 M.J. at 626 n.1.

[81] United States v. Kahakauwila, 19 M.J. 60 (C.M.A. 1984).

[82] MCM, 1984, Part IV, para. 37c(5).

[83] *Dallman*, 32 M.J. at 633.

[84] *Id.*

[85] *See supra* note 73.

[86] *Dallman*, 32 M.J. at 633.

ingly, the government would have the additional burden of proving prejudice as well as the elements of the state offense. If, however, the conduct were charged under clause three of article 134 as an Assimilative Crimes Act violation, the government would have to show only a bare violation to obtain a conviction.

Conclusion

Physicians, as professionals, occupy a special position of trust in our society. Because of that position, they possess special opportunities to abuse the trust given them. Accordingly, when a doctor is discovered abusing this trust by distributing drugs through the use of prescriptions outside the usual course and scope of professional practice and without legitimate medical purpose, justice requires prosecution with the professional diligence this serious crime deserves.

United States v. Dallman is the first military case to report the prosecution of a military physician for this type of misconduct. Accordingly, it forms the framework after which future prosecutions may be modeled. It adopts for the military the standard by which wrongfulness is judged and provides counsel with issues for consideration.

Presumably, this type of crime will remain a rare and novel one in the military. Nevertheless, military trial and defense counsel not only must recognize the vast potential for instances of this type of misconduct, but also must be prepared to meet the unique challenges they present.

Running an Effective Tax Assistance Program

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Introduction

New military attorneys working in legal assistance frequently find themselves overwhelmed during tax season. Appointment backlogs grow as clients seeking help with their taxes inundate the legal assistance office. Legal assistance attorneys receive more telephone calls for tax information than they can return between appointments. Waiting rooms fill up with clients wanting tax forms and assistance. The demands placed on legal assistance attorneys become so great that their morale begins to suffer and the chance of committing errors increases.

It does not have to be like this. A distinction exists between working hard and working effectively. The trick is to harness the energies of others and mobilize a team to answer tax questions and prepare tax returns.

This article provides legal assistance attorneys with suggestions on how to run an effective tax assistance program. The concepts discussed can be applied at installations in the United States and overseas. While the article was written with the newly assigned legal assistance attorney in mind, seasoned practitioners also may find ideas to incorporate into existing programs.

Learn What Is Expected

What is expected of a legal assistance attorney during tax season? A wealth of information is available on this subject. The legal assistance attorney must become acquainted with this information long before tax forms and forms W-2 arrive.

Staff judge advocates (SJAs) and legal assistance attorneys (LAAs) may find regulatory guidance on providing tax services in Army Regulation 27-3, paragraph 2-5a(5):

> Clients wanting tax guidance and preparation assistance should first seek assistance from their unit tax advisors. LAAs will give general advice and assistance about Federal, State, and local taxes and make tax forms available for filing returns and related petitions and appeals. LAAs may complete simple income tax returns for clients. LAAs specifically may not sign as the paid preparer of tax forms. Where appropriate, LAAs should indicate that the form was prepared under the Internal Revenue Service Volunteer Income Tax Assistance program. LAAs may not give tax advice concerning private income producing business activities; this exclusion does not include tax advice concerning personal investments or renting out a client's principal residence. Tax information and training sessions, including those conducted by Federal and State tax authorities, should be sponsored on military installations. All tax assistance programs will be supervised by the SJA or senior legal officer. Requests to establish commercial tax preparation services that compete with a free service under the Army Tax Assistance Program must be approved by The Judge Advocate General. Requests will be forwarded to HQDA (DAJA-LA) WASH DC 20310-2215.

This paragraph answers basic questions about what the Army expects of legal assistance attorneys. They are to set up tax training sessions and supervise the rendering of tax services in the military community. These services will include assistance with state, local and federal

income taxes. Legal assistance attorneys should be prepared to provide general tax advice, but need not venture too deeply into the intricacies of the tax codes. No one expects a legal assistance attorney to have an LL.M. in tax law, and the regulation itself limits the extent and form of assistance a military attorney may provide. A military attorney should not assist in the preparation of unusually complex returns or returns involving business-related income because this type of activity exceeds the scope of the Army Tax Assistance Program.

The Judge Advocate General (TJAG) policy letters[1] and messages[2] contain additional guidance. The *Model Tax Assistance Program*,[3] published annually by The Judge Advocate General's School (TJAGSA), contains a model standard operating procedure (SOP) outlining the scope, preparation and implementation of a tax assistance program. The Model Program also provides program milestones, information papers, tax form request letters, sample newspaper articles, posters, and after-action reports. A few hours spent studying this valuable resource may save several weeks of work later in the season.

TJAGSA also publishes an annually updated *Tax Information Series*,[4] which is full of helpful handouts, and *The Legal Assistance Attorney's Federal Income Tax Guide*,[5] a research aid that follows the format of Form 1040. The United States Air Force Judge Advocate General's School compiles the annual *All States Income Tax Guide*,[6] an excellent summary of state income tax laws. Additional information on state income tax liability can be found in appendix G of the *Voting Assistance Guide*.[7] The Internal Revenue Service (IRS) publishes a wide variety of research and training aids.[8] IRS Publication 17, *Your Federal Income Tax*, is an essential reference; it contains answers to most of the federal tax questions clients ask. The five-volume IRS Publication 1194, *Tax Information Publications*,[9] expands upon the information contained in Publication 17. No tax library is complete without a copy of IRS Publication 1132, *Reproducible Federal Tax Forms for Use in Libraries*,[10] or Package X, *Informational Copies of Federal Tax Forms*.[11] Legal assistance attorneys also should ensure that their offices have the latest editions of the *Internal Revenue Code* and complete sets of *Federal Income Tax Regulations*.

After becoming familiar with these sources, the legal assistance attorney must discuss the tax program with the staff judge advocate. The legal assistance attorney's recommendations on how to structure the tax program will carry more weight if the attorney clearly understands what is required by regulation. The discussion should take place in August or September—well before tax season begins—to allow the attorney plenty of time to implement the tax assistance program.

With proper preparation, the attorney should be able to fashion a program tailor-made to the needs of the community—a program that will satisfy the expectations of taxpayers, the staff judge advocate, and the commander.

Preparing for the Tax Season

What ensures the success of a tax assistance program? The following elements are essential:

(1) Advance planning by legal assistance attorneys;

(2) Conscientious unit tax advisors (UTAs);

(3) Command support;

(4) IRS support;

(5) Army Community Service (ACS) support.

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[1]Policy Letter, HQ, Dep't of Army, DAJA-LA, 13 Oct. 88, subject: 1989 Army Tax Assistance Program; Policy Letter, HQ, Dep't of Army, DAJA-LA, 18 Oct. 85, subject: Army Tax Assistance Program.

[2]Message, HQ, Dep't of Army, DAJA-LA, 242010Z Jun. 88, subject: The Army Tax Assistance Program (ATAP) and Paid Preparer Services on Post.

[3]Legal Assistance Branch, Administrative and Civil Law Division, The Judge Advocate General's School, U.S. Army, The Model Tax Assistance Program, (Sept. 1990).

[4]Legal Assistance Branch, Administrative and Civil Law Division, The Judge Advocate General's School, U.S. Army, Tax Informational Series (Jan. 1990).

[5]Legal Assistance Branch, Administrative and Civil Law Division, The Judge Advocate General's School, U.S. Army, The Legal Assistance Attorney's Federal Income Tax Guide (Jan. 1990).

[6]Preventive Law Programs, Air Force Judge Advocate General's School, U.S. Air Force, All States Income Tax Guide (1991)(distributed by the Director, Preventive Law Programs, Air Force Judge Advocate General's School, Maxwell Air Force Base, Alabama 36112-5712).

[7]Dep't of Army, Pam. 360-503 (1990); *see also* Dep't of Navy, NAVPERS 15562 (1990); Dep't of Air Force, Pam. 211-4 (1990); Dep't of Navy, NAVMC 1174 (Rev. 88); Dep't of Navy, COMDTINST M1742.2.

[8]Internal Revenue Serv., Pub. 17, Your Federal Income Tax (1991) [hereinafter IRS]; IRS, Pub. 678, Volunteer Assistor's Guide (1991); IRS, Pub. 678-M , Volunteer Assistor's Guide (Military Module) (1991); IRS, Pub. 678-I, VITA International (1990); IRS, Pub. 776, Overseas Filers of Form 1040 (1991).

[9]This reference work contains all IRS looseleaf publications. The numbers of the publications contained in each volume appear on the spine of that volume.

[10]This publication is designed to fit in a three-ring looseleaf binder. The pages can be taken out and placed flat on a photocopier, for excellent copy quality.

[11]Refer to the table of contents in volume 2 of this two-volume bound publication for a complete listing of Package X forms.

Not one element can be sacrificed without compromising the quality of the program.

After the staff judge advocate approves plans for the tax program, the legal assistance attorney must begin to prepare for the tax season. The attorney can do many things between September and January to ensure the success of the tax program.

Develop a Standard Operating Procedure

By outlining program policies, procedures, and responsibilities in writing at the outset, the legal assistance attorney reduces the chances of confusion and conflict. The SOP in the *Model Tax Assistance Program*[12] easily can be adapted for local use. Likewise, a legal assistance attorney can promote efficiency by issuing a letter of instruction (LOI) for all tax advisors in the command.[13]

At a minimum, the SOP or LOI should cover training and reporting requirements, describe the scope of assistance to be rendered, and set forth the staff judge advocate's policies on referring taxpayers to the legal assistance office. A tax assistance worksheet should be enclosed, with instructions on how to use it to send statistical reports to the legal assistance office.

Secure Command Support

The staff judge advocate will get the best results by persuading his or her commander to play an active role in the tax assistance program. Without command support, the legal assistance attorney's efforts are less likely to succeed.

A tax assistance program SOP or LOI can be a useful tool to obtain command support. Commanders generally are more willing to endorse a program that is defined clearly on paper. The staff judge advocate can use the SOP or LOI to brief the commander on the tax program and should enclose it with decision papers.

A commander may demonstrate support for the tax program in several ways. He or she can emphasize the importance of the tax assistance program at staff calls and commanders' conferences. In addition, the commander should sign a memorandum in the fall requiring company or battalion level unit commanders to appoint well-qualified UTAs, sending this memorandum through brigade and battalion commanders to obtain their support. To facilitate the appointment process, the commander should address an "additional duty appointment" form to the legal assistance attorney and attach it to the memorandum. The commander also ought to consider signing a memorandum for the tax advisors explaining exactly what the commander expects them to do. The legal assistance attorney then should place this memorandum in welcome packets to be handed out on the first day of the tax training seminar in January.

The staff judge advocate should invite the commander to address the tax training seminar. Upon the commander's acceptance, the legal assistance attorney can draft a speech for the commander, strongly endorsing the concept of free tax assistance. A visit by the commander serves two purposes: it alerts tax advisors to the commander's interest in the success of the tax program, making them "sit up and take notice," and it provides the commander with an opportunity to see the effort the staff judge advocate's office has put into organizing the tax training.

Coordinate with the Internal Revenue Service

Legal assistance attorneys too often view the IRS as an adversary. Attorneys tasked with running a tax assistance program should think of the IRS as an ally. By forging a close relationship with the IRS, they can ensure the success of their tax training programs and enhance their abilities to help clients who have serious tax problems.

The IRS sponsors the Volunteer Income Tax Assistance (VITA) program, which trains volunteers to provide free tax assistance. VITA seminars usually are taught by experienced taxpayer service specialists, who receive special training before being sent out to teach. These instructors have a great deal of experience in processing tax returns and in assisting taxpayers.

For a legal assistance attorney with little or no practical tax experience, having an IRS VITA instructor teach tax advisors makes good sense. Taxpayer service specialists are equipped better to answer the myriad questions tax advisors ask about filing and audit procedures than is an inexperienced attorney. Moreover, when the IRS does the teaching, the legal assistance attorney can devote his or her attention to organizing the tax program.

Close coordination with the IRS is essential, not only to lining up a VITA instructor, but also to securing adequate training materials and tax forms. The VITA training manuals are the best step-by-step tax guides available, but they will not arrive automatically; the attorney must order VITA materials in the fall and periodically must check on the status of the order to ensure the materials are delivered in time.

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[12] *See supra* note 3.

[13] *E.g.*, Memorandum, HQ, 3d ID, AETS-JA-LA, 18 Jan. 91, subject: 1991 Marneland Tax Assistance Program LOI (appendix 2).

Involve Volunteers

Although UTAs are a primary source of tax assistance to soldiers and their family members, they cannot meet the needs of all the taxpayers in the military community. For example, civilian employees and retirees also need tax assistance; however, they neither are assigned to a military unit nor are dependents of a soldier on active duty. Moreover, family members of active duty soldiers are sometimes reluctant to share information about their finances with someone in their sponsor's chain of command, and may prefer to seek tax assistance from someone other than their UTAs.

To meet the needs of these taxpayers, the legal assistance attorney may wish to coordinate with ACS to recruit and organize teams of volunteer tax advisors. ACS volunteers can staff tax assistance centers and electronic filing sites, providing an important alternative for taxpayers who cannot or will not avail themselves of the services of a UTA.

To obtain the assistance of ACS, the legal assistance attorney must enlist the support of the community ACS officer, and invite ACS financial counselors and volunteers to attend tax training seminars. In recent years, ACS has attempted to reduce its role in the Army Tax Assistance Program. A legal assistance attorney who encounters reluctance on the part of ACS to support the program should remind the ACS officer that the Army Chief of Staff has directed local ACS offices to use volunteers to supplement UTAs.[14] If this reminder does not suffice, the attorney may need to seek the help of the staff judge advocate.

If used, ACS tax advisors must understand the reporting requirements of the tax program because the legal assistance attorney must report their statistics to Headquarters, Department of the Army, in a separate "volunteer" category at the end of tax season.

Set Up Tax Training Seminars

Tax training seminars provide the legal assistance attorney with an opportunity to get the tax program off on the right foot. Ideally, each seminar will combine technical tax training and administrative instructions with pep talks by the staff judge advocate and the commander.

Tax advisors who are providing tax assistance for the first time should attend at least two-and-a-half days of tax training. Three or four days of training is preferable. For veteran tax advisors, a one- or two-day refresher course is usually adequate. At a minimum, the training should cover preparation of forms 1040EZ, 1040A, and 1040. Trainers also should address state income tax and, at overseas locations, foreign tax issues. In all seminars, regardless of which subjects are emphasized, practical exercises are indispensable.

Selecting the right location for the tax seminar is critical. Movie theaters are not suitable for tax training. Attendees will need cafeteria-size tables to permit them to read from several training manuals at once. Legal assistance attorneys should request the use of dining facilities for classrooms, or use training funds to rent the ballroom of the local officers' club.

Running an effective tax training seminar also requires extensive coordination and advance work. Legal assistance attorneys should make hotel reservations for their VITA instructors and write to them, describing their community, the tax assistance program, and the topics of greatest concern to their tax advisors. To the maximum extent possible, they must ensure that tax training does not conflict with other training or field exercises. Accordingly, they should lock-in tax training dates on the command training calendar and on the community major events calendar. Attorneys also should ask the commander or chief of staff to excuse attendees from all other conflicting duties during tax training. Finally, they should conduct a media blitz, using direct mail, distribution, e-mail, telephone calls, and bulletin announcements to notify commanders and tax advisors of the time and location of the seminar. The blitz should commence at least one week before the seminar opens.

The legal assistance attorney must pay attention to details during the seminar. The teacher and the attendees should have refreshments. A public address system is essential, as is a podium, a blackboard, and an overhead projector with a screen. The attorney should provide back-up systems for all audio-visual equipment and should set up a message board in the back of the room to minimize interruptions. Tax trainers should take attendance at different times each day, to prevent attendees from simply signing in and leaving. They also should provide attendees with a basic issue of tax forms on the last day of the seminar to cut down on taxpayer traffic in the legal assistance office.

Legal assistance attorneys who do not take charge of their tax training seminars are courting disaster. Murphy's Law is particularly applicable to a large scale training effort. Nothing is as easy as it looks. Everything takes longer than you expect. And if anything can go wrong it will—at the worst possible moment.

Build a Tax Advisor Data Base

Legal assistance attorneys should build a tax advisor data base on Enable, using information taken from appointment orders and tax training seminar registration forms. This type of data base makes the job of coordinat-

[14] Message, HQ, Dep't of Army, DACS-ZA, 081736Z Sep 87, Army Tax Assistance Program.

ing the tax program much easier. It can be used to print address labels for mass mailing of tax memoranda and materials to tax advisors, provide information needed for coordination with unit commanders, and produce lists of tax advisors for publication on legal assistance bulletin boards and community newspapers.

Order Extra Tax Forms and Resources

All the work put into organizing the tax program and training tax advisors will be for naught if tax forms fail to arrive on time. Although higher headquarters normally will order federal and state tax forms for legal assistance offices, the forms distribution system occasionally breaks down. To ensure their offices are not caught empty-handed when taxpayers start asking for tax forms in January, legal assistance attorneys should order a back-up supply of state and federal income tax forms well before the tax season opens. Attorneys may obtain federal forms from their servicing IRS Forms Distribution Centers and may obtain state forms from the state tax authorities listed in the Air Force's *All States Income Tax Guide.*

Commerce Clearing House (CCH) produces a multi-volume looseleaf service, that contains reproducible versions of every state income tax form legal assistance clients likely are to need.[15] The Army Law Library Service no longer will supply this invaluable publication. Staff judge advocate offices therefore must order it directly from CCH, using local funds. The service, however, is well worth the expense, and should be a permanent part of every legal assistance office's tax library.[16]

Gear Up for Electronic Filing

Electronic filing of federal income tax returns has become an important part of the tax assistance program at many military installations in the United States and will be available at some overseas locations this year. Electronic filing reduces errors and speeds up processing time, permitting refunds to be deposited directly into the taxpayer's bank account.

The IRS publishes several pamphlets on electronic filing. An extended discussion of how to set up an electronic filing program can be found in the September 1989 issue of *The Army Lawyer.*[17]

Publicize the Program

Training tax advisors, if no one knows they exist, is pointless. Legal assistance attorneys and tax advisors must work together to publicize the tax assistance program. Attorneys need to take the lead in letting the public know free tax help is available. Radio announcements, newspaper articles, weekly bulletins, and Headstart briefings can help get the word out. Attaching notices to soldiers' February leave and earnings statements, informing them that free tax help is available, is another good way to publicize the program; however, legal assistance attorneys will have to coordinate this in advance with finance officials. Tax advisors also can advertise their services by addressing unit formations and by putting up "free tax help" posters in mail rooms, day rooms, dining facilities, theaters, and other high traffic areas.[18]

Keep Things Under Control

Attorneys easily can be overcome by events and miss important deadlines during tax season. The best way to stay on top of things is to set up a special planning calendar containing all the critical dates for coordinating tax training, ordering forms, and turning in statistical reports.

The additional burdens imposed on legal assistance offices during tax season can be managed effectively by following a few simple rules.

- Monitor tax materials as they come in. Reorder any tax forms that have not arrived by February.

- Ration tax forms to one or two per customer. Tax forms left unattended on a table in a hallway or waiting room may disappear quickly, but often are never used.

- Make sure that UTAs do their jobs. Taxpayers should consult their UTAs before seeing legal assistance attorneys. Legal assistance attorneys should advise UTAs instead of taxpayers whenever possible, and should accept a referral only when a taxpayer's case requires a lawyer's expertise.

- Train legal assistance secretaries and support personnel to ask taxpayers seeking tax assistance whether they have discussed the matter with a tax advisor and to refer taxpayers to UTAs whenever possible. When the taxpayer already has seen a tax advisor, secretaries and support personnel should encourage the taxpayer to relay his or

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[15] State Personal Income Tax Forms, (CCH) (distributed by Commerce Clearing House, Inc., 4025 W. Peterson Avenue, Chicago, Illinois 60646, Tel. (312) 583-8500).

[16] IRS, Pub. 1345, Revenue Procedure for Electronic Filing of Individual Income Tax Returns (1991); IRS, Pub. 1346, Electronic Return File Specifications for Individual Income Tax Returns (1991); IRS, Pub. 1347, Electronic Return Record Layouts for Individual Income Tax Returns (1991).

[17] Captain Jose F. Monge's note, *Electronic Filing of Income Tax Returns: A Recommended Approach*, is essential reading. *See* The Army Lawyer, Sept. 1989, at 47.

[18] *The Model Tax Assistance Program*, *supra* note 3, contains a series of reproducible posters beginning at page 55.

her question to the legal assistance attorney through the taxpayer's UTA.

• Communicate regularly with tax advisors and remind them to report statistics. Monitor the statistics to see who is doing the job and who is not.

• Have tax advisors come to the legal assistance office with a consolidated list of tax forms needed by unit members. This reduces congestion in the waiting room and leaves the UTAs more time to devote to their missions.

Make a Good Program Better

What if you are assigned to an office that already has a thriving tax assistance program? What can you do to make a good program even better?

Institute Quality Control Measures

Nothing is more damaging to a tax assistance program than a few well-meaning, but incompetent, tax advisors who give out bad tax advice. The Army Rules of Professional Conduct for Lawyers require that lawyers provide competent representation to clients,[19] and that they make reasonable efforts to ensure that the conduct of the nonlawyers they supervise is compatible with the professional obligations of a lawyer.[20]

Screening volunteers is not easy. No one wants to look a gift horse in the mouth. Even so, each potential tax advisor should take the Volunteer Income Tax Assistor test[21] before he or she assumes his or her duties. Anyone who fails the test should be required to study the course materials again and take a retest. Volunteers who do poorly on the retest should not provide clients with tax assistance.

Commanders need to know the profile of a good tax advisor. Ideally, each commander should appoint a bright, highly motivated unit tax advisor who has at least a year left in the unit at the time of his or her appointment and who will be able to devote sufficient time to the program.

Tax advisors must be sensitized to ethical issues that are likely to arise during tax season. Caution them against accepting payment or favors, and warn them to avoid even the appearance of impropriety or partiality—for example, referring taxpayers to a friend who is a commercial preparer. Tax advisors also should refuse to assist taxpayers who want to falsify their returns.

Take Your Program to the People

Legal assistance attorneys who run the best tax assistance programs do not sit behind their desks, waiting for tax clients to be referred to them. Instead, they take their programs to the people.

One very effective way to do this is to organize battalion-size "tax days." This permits the legal assistance attorney to brief hundreds of soldiers at one time, after which the UTAs can prepare soldiers' tax returns while the soldiers wait.[22] Another technique, which has worked well in Europe, is to operate a mobile tax assistance trailer staffed by legal assistance personnel and volunteers.[23] Parking the trailer in front of the entrance to the main post exchange attracts maximum attention and ensures a steady flow of clients.

A comprehensive, well-disseminated tax information program is the hallmark of a good tax assistance program. A strong information program not only tends to publicize the tax assistance program, but also increases overall awareness of tax issues in the military community. To achieve these objectives, legal assistance attorneys should write articles for command information newspapers—pointing out recent changes to tax laws—or produce radio features or take part in radio phone-in programs on taxes. Television spots can be an even more effective way of providing the public with tax information.[24]

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[19] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers, Rule 1.1, (31 Dec. 1987) [hereinafter Professional Conduct], states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

[20] Professional Conduct, Rule 5.3(b) states: "With respect to a nonlawyer under the authority, supervision, or direction of a lawyer . . . a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."

[21] IRS, Pub. 6744, Volunteer Assistor's Guide Test (1991).

[22] 1st Armored Division's Bamberg office often has organized mass tax assistance sessions for entire battalions.

[23] 8th Infantry Division's Baumholder office has run a mobile tax assistance trailer for several years.

[24] Mr. John K. Martensen of V Corps and Mr. Jerry E. Shiles of 21st TAACOM have become familiar faces to viewers of Armed Forces Network television in Germany, where their "AFN Tax Advisor" spots are aired repeatedly during tax season.

Recognize the Efforts of Your Tax Advisors

Napoleon once observed that "it is with baubles that men are led." Outstanding efforts by tax advisors deserve recognition. Persons who serve as unit or volunteer tax advisors for an entire tax season ought to be recognized formally for their efforts. This recognition not only rewards deserving individuals, but also provides an incentive for new tax advisors.[25] The IRS provides attractive VITA certificates that thank tax advisors for their "noteworthy contributions."[26] Legal assistance attorneys should send these certificates to commanders to present to tax advisors. Commanders also may wish to recognize truly exceptional performance with appropriate medals or awards.

Another way to show tax advisors that their efforts are appreciated is to throw end-of-tax-season parties or receptions. These are particularly appropriate when there are a large number of volunteer tax advisors in a community.[27]

Write an After-Action Report and Share Successes

Legal assistance attorneys must be sensitive to tax reporting requirements. The IRS requires tax-preparers to file periodic statistical reports. Failure to provide these reports in a timely manner can compromise funding for future VITA seminars. The Army Legal Assistance Office (DAJA-LA) also requires an end-of-tax-season statistical report, which must be signed by the staff judge advocate.

Statistics alone, however, cannot tell the whole story. Many good ideas are lost at the end of each tax season because they are never committed to paper. Judge advocates serving as legal assistance attorneys usually change jobs after a year or so, and they seldom serve through two consecutive tax seasons. Unless they record their experiences, their successors will have to learn from scratch. Passing on a tax planning calendar or drawing up an after action report gives next season's legal assistance attorneys a leg up.

The knowledge a legal assistance attorney learns in a single tax season should not be limited to his or her immediate successor. All the Army should benefit. Accordingly, legal assistance attorneys must try to prepare after-action reports that their staff judge advocates can forward to higher headquarters without revision. A good after-action report that finds its way into the right hands at higher headquarters can bring about systemic changes that will improve the Army Tax Assistance Program for everyone.

Similarly, a legal assistance attorney should share ideas and innovations from his or her tax assistance programs with the Legal Assistance Branch of TJAGSA's Administrative and Civil Law Division. This permits the Legal Assistance Branch to incorporate this information in future editions of the *Model Tax Assistance Program.*

Legal assistance attorneys should bear in mind that they can benefit personally from sharing their accomplishments. Skilled administration of a tax assistance program may warrant nomination for either an Army Community of Excellence Award or the Army Chief of Staff Award for Excellence in Legal Assistance.

Conclusion

Tax season represents a golden opportunity for legal assistance attorneys to get out from behind their desks and become leaders in their military communities. They can do a lot of good for the soldier and can generate positive publicity for their legal assistance offices. Legal assistance attorneys who do their homework, prepare for the tax season, maintain control of their programs, and seek ways to improve them likely will be rewarded with even greater professional challenges.

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[25] 3d Infantry Division presented Tax Advisor of the Year awards in each of its military communities in 1990. Commanders and supervisors were invited to nominate tax advisors who had done an exceptional job for this honor. Winners received a certificate signed by the community commander and were invited to address the tax training seminar.

[26] *IRS Form 4659-B.*

[27] 21st TAACOM's Mannheim office threw an end-of-tax-season reception for its UTAs in July 1989. Refreshments were served along with a cake that read "Thank You UTAs." A group photograph was taken. Tax advisors were encouraged to bring their last statistical report with them and to submit it in exchange for their VITA certificate.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

As the Hammer Falls: UCMJ Article 13 and Illegal Pretrial Punishment

Many company-level commanders subscribe to a simple and direct philosophy of discipline: to be effective, punishment for wrongdoers should be quick, stern, and highly visible. The problem facing defense counsel is to channel this zeal away from actions that harm the rights of clients facing trial. Defense counsel need to be aware of the parameters of Uniform Code of Military Justice (UCMJ) article 13,[1] both to prevent or stop abuses and to gain proper sentencing credit for a convicted client. Article 13 provides:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.[2]

United States v. Washington,[3] a recent unpublished memorandum opinion, indicates that the Army Court of Military Review continues to be sensitive to the issue of illegal pretrial punishment. In *Washington* the accused was brought to a unit formation in handcuffs and leg irons. He had no history of violence or attempted flight to necessitate the restraining irons. The commander intentionally held the formation beyond its normal duration to subject the accused to public opprobrium. The court condemned this conduct and reduced the accused's confinement by one month.[4]

United States v. Cruz[5] is the seminal case dealing with this issue. In *Cruz* a division artillery (DIVARTY) commander determined that a large-scale drug abuse problem in his unit required drastic action. He assembled his command in a mass formation, then began speaking about trust and how that trust had been betrayed by members of the unit. As he spoke, German *polizei* and Army military police positioned themselves around the formation. The DIVARTY commander abruptly called out the names of approximately forty soldiers whom he suspected of drug abuse. As previously arranged, the police seized these soldiers and escorted them to a platform at the front of the formation. The DIVARTY commander met the suspects on the platform, disdainfully refusing to return their salutes, and ordered most of them stripped of their unit crests. The Army Court of Military Review assumed, for purposes of its decision, that the DIVARTY commander also derided the suspects as "bastards" and "criminals". The suspects then were marched to an adjacent site, where the military police searched and handcuffed each of them in full view of the soldiers remaining in the formation.

After investigators questioned the suspects at the local Criminal Investigation Command (CID) office, the commander culled thirty-five of them from their unit and billeted them in separate quarters. Known as the "Peyote Platoon," this "unit" assembled apart from its parent battalion in formations, and allegedly marched to the cadence of "peyote, peyote, peyote."

The Court of Military Appeals examined this sequence of events to gauge its impact on sentencing and to determine whether this treatment amounted to punishment prohibited by article 13. The court concluded that the public condemnation and ostracism of the accused cast grave doubts on the fairness of the sentencing hearing, that this treatment violated article 13, and that the failure of defense attorney to raise this issue at trial came perilously close to inadequate representation.[6]

The court likened the command's treatment of the accused to traditional military punishments, such as placarding, divesting a disgraced soldier of all military insignia, drumming—or bugling—out of the service, and the "rogue's march." This treatment, the court held, clearly constitutes unlawful punishment prohibited by

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[1] Uniform Code of Military Justice art. 13, 10 U.S.C. § 813 (1982) [hereinafter UCMJ].

[2] UCMJ art. 13.

[3] CM 9003352 (A.C.M.R. 19 June 1991) (unpub.).

[4] *Id.*, slip op. at 2.

[5] 25 M.J. 326 (C.M.A. 1987).

[6] *Id.* at 329-30.

article 13.[7] The court dismissed the government's contention that, because the commander had intended only to curb the drug problem in his unit, his denunciation and degradation of the accused was not actually punitive. Under this rationale, the court reasoned, a commander would not violate article 13 even if he or she ordered an arrestee shot or flogged, if the commander's ultimate purpose was to benefit the unit as a whole. The reasonableness of the commander's conduct always must be considered when a commander acts against a criminal accused under the color of furthering a nonpunitive government objective.[8]

The Army Court of Military Review, following *Cruz*, upheld the actions of a company commander in *United States v. Van Metre*.[9] In *Van Metre* the accused's company commander placed certain restrictions on the accused's liberty after his arrest for assault.[10] The commander further required the accused to remove an "Honor Guard" tab from his battle dress uniform (BDUs), ostensibly to ensure that he would not embarrass the unit if he broke restriction and left the installation. The court did not condone the removal of the tab. It noted, however, that no member of the chain of command denounced or humiliated the accused, and that no evidence suggested that the accused was maltreated or ostracized by his fellow soldiers after removing the tab. It concluded that the commander had not ordered the accused to remove the tab as part of a specific design to humiliate or ridicule him. Accordingly, the Court found that the commander's conduct did not violate the accused's rights under article 13.

In *United States v. Villamil-Perez*[11] the Army Court of Military Review examined the circumstances surrounding the accused's arrest for drug offenses. Shortly after the arrest, the battalion motor officer, who was the accused's supervisor but not his commanding officer, posted a serious incident report (SIR) on the work area bulletin board. The SIR described the offenses the accused allegedly had committed, recounted the accused's military history—specifically mentioning that the accused once had received a general officer letter of reprimand for driving while intoxicated—and made several references to the accused's family. This information remained on the bulletin board for three or four days.

The court stated that Congress intended to prohibit pretrial punishment of an accused by any official in a position of authority over the accused. That a supervisor, rather than a commander, inflicted the "punishment" in this case did not remove this case from the scope of article 13. The court found, however, that posting an SIR in the accused's principal place of duty was not a punishment or penalty within the meaning of Article 13. All the information contained in the SIR, except for the alleged new offenses, reasonably would have been known to personnel with duties at the accused's workplace. Moreover, the fact that a soldier has been charged with certain offenses need not be kept secret. Therefore, the posting of alleged offenses, including readily known personal information, does not amount to apparent command final determination of guilt or the type of opprobrium found in *Cruz*.[12]

The apprehension of a soldier in a manner designed to humiliate, ridicule, or harass conflicts with the presumption of innocence and violates the soldier's rights under article 13. Although commanders occasionally will have legitimate reasons to conduct a mass apprehension, the use of mass apprehensions as a deterrent to others, or to humiliate or ridicule the soldiers arrested, is also inappropriate. Any action resembling a present or former punishment under military law, any unnecessary public identification of an apprehended soldier as a subject of a criminal investigation, are suspect. Defense counsel must investigate allegations of these acts for possible violations of article 13. Counsel also should remember that not all unlawful pretrial punishment occur outside the jail cell and should watch for illegal punishment whenever an accused is confined before trial by civilian or military authorities.[13]

If the defense counsel discovers a violation of article 13, he or she should take it up first with the trial counsel. The offending commander may be more willing to accept

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[7] *Id.* at 330.

[8] *Id.* at 330 n.4.

[9] 29 M.J. 765 (A.C.M.R. 1989).

[10] The military judge found the physical restrictions the command placed on the accused to be tantamount to confinement. *See id.* at 766.

[11] 29 M.J. 524 (A.C.M.R. 1989).

[12] *Id.* at 525.

[13] *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979) (punishing a detainee prior to an adjudication of guilt violates the Due Process Clause); United States v. James, 28 M.J. 214 (C.M.A. 1989) (requiring soldier in civilian prison to wear orange jumpsuit instead of uniform and to participate in daily cleaning of his cell with no other required labor did not violate article 13); United States v. Palmiter, 20 M.J. 90 (C.M.A. 1985) (setting forth guidelines for applying article 13 to particular conditions of pretrial confinement, the court held that accused's failure to contest the conditions of pretrial detention before a magistrate will be considered strong evidence that the accused was not illegally punished); United States v. Herrin, CM 9000641 (A.C.M.R. 31 May 1991) (requiring noncommissioned officer (NCO) detainee to work in immediate association with lower ranking convicted prisoners and to perform work inconsistent with his rank and status as an NCO violated article 13).

a complaint of illegal punishment from the command's attorney than from the defense. If the trial counsel fails to correct the problem, the defender should see the commander personally. If the commander persists, the defense counsel must bring the violation to the attention of the Staff Judge Advocate, the appropriate convening authority, or the Inspector General's office. A defender must NEVER waive the issue—whenever illegal punishment occurs, defense counsel always should take it up with the military judge. Captain Huber.

Article 134—Mail Theft: Is it Mail or Is it Larceny?

Offenses involving mail normally are charged under Uniform Code of Military Justice article 134,[14] which prohibits "taking, opening, secreting, destroying, or stealing mail."[15] However, when a soldier is accused of taking or stealing mail matter,[16] the status and custody of the mail at the time of the taking or stealing must be examined to determine the proper charge and the maximum possible punishment.

If the property involved is not "mail matter" or if "delivery" was complete[17] at the time the property was taken or stolen, the appropriate charge may be larceny or wrongful appropriation,[18] rather than taking or stealing mail. This distinction may affect the severity of the punishment significantly. The maximum punishment for taking or stealing mail matter includes a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.[19] Once personal mail is delivered, however, the penalty for its theft drops sharply. For example, the maximum potential penalty for theft of nonmilitary property of a value of $100 or less is only a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months.[20] For wrongful appropriation of that same property, the maximum punishment includes confinement for three months and forfeiture of two-thirds pay for three months, but does not include the possibility of discharge.[21]

The characteristics that make a letter or package mail matter rather than ordinary property can be difficult to determine. Inconsistent opinions by both military and federal courts further complicate the identification process. The UCMJ article 134 mail offense, which is largely derived from federal criminal statutes,[22] defines mail matter as "any matter deposited in a postal system of any government or any authorized depository thereof or in official mail channels of the United States or an agency thereof including the armed forces."[23]

Surprisingly, few recent military cases address the subject. For the most part, these cases deal with sufficiency of specifications.[24] In *United States v. Manausa*,[25] the leading military case on mail theft, the court upheld a conviction for larceny and wrongfully opening mail when the accused, a mail clerk, stole letters after they arrived in the unit mail room, but before they were delivered to the addressee. Focusing on the concept of delivery, the court held that mail is protected until it is delivered to the addressee, subject only to the exigencies of military serv-

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[14] UCMJ art. 134.

[15] Manual for Courts-Martial, United States, 1984, Part IV, para. 93 [hereinafter MCM, 1984].

[16] The common elements for taking and stealing mail are as follows:

(1) the accused took or stole certain mail matter;

(2) the taking or stealing was wrongful;

(3) the mail matter was taken or stolen before it was delivered to or received by the addressee; and

(4) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

The offense of taking mail matter adds the following element:

(5) that such taking was with the intent to obstruct the correspondence or pry into the business or secrets of any person or organization;

MCM, 1984, Part IV, para. 93b(1), (2).

[17] MCM, 1984, Part IV, para. 93b (1) and (3).

[18] UCMJ art. 121(a)(1), (2).

[19] MCM, 1984, Part IV, para. 93e.

[20] MCM, 1984, Part IV, paras. 46b(1), 46e(1)(b).

[21] *Id.* paras. 46b(2), 46e(2)(a).

[22] *See* 18 U.S.C. §§ 1702, 1708 (1982).

[23] MCM, 1984, Part IV, para. 93c.

[24] *See* United States v. Gaudet, 29 C.M.R. 488 (C.M.A. 1960) (value of mail is irrelevant in mail-theft charge); United States v. Thurman, 27 C.M.R. 451 (C.M.A. 1959)(specification alleging theft of mail required instruction and proof of larceny elements); United States v. Lorenzen, 20 C.M.R. 228 (C.M.A. 1955) (specification alleging that accused opened a package addressed to a named individual failed to state an offense); United States v. Belisle, 39 C.M.R. 307 (A.B.R. 1968)(specification alleging that accused stole a letter addressed to a named person from the unit orderly room before delivery to addressee was insufficient); United States v. Murzda, 38 C.M.R. 549, (A.B.R. 1967) (UCMJ art. 121 larceny conviction upheld, but court commented that even though specification did not allege "mail matter" or "postal service," it would have been sufficient for UCMJ art. 134 conviction because it alleged that a specific letter addressed to a named individual was stolen from unit mailroom before delivery); United States v. Smith, 10 C.M.R. 262 (A.B.R. 1953)(specification alleging that accused stole a package addressed to a named individual was sufficient for larceny but not for theft of mail).

[25] 30 C.M.R. 37 (C.M.A. 1960).

ice.[26] The court interpreted earlier cases as clearly indicating that delivery occurs when the addressee or his or her duly authorized representative receives the mail.[27]

Federal courts have followed the "mail-until-delivery" rationale consistently[28] and, until recently, so have military appellate courts. In *United States v. Sullivan*[29] the post office could not deliver a check mailed from the installation finance center, and eventually marked it "return to sender." The finance center dispatched a courier to retrieve the check. The courier picked up the check, but instead of returning it to the finance center, he kept it. Reviewing these facts, the court held that the check never had left the postal system. When the post office is forced to return mail as undeliverable, the court ruled, the sender becomes the addressee.[30]

Likewise, in *United States v. Smith*[31] the court held that a check, which the accused stole after it was delivered to a squad delivery box in the unit mailroom but before the addressee could pick it up, was mail matter for the purposes of UCMJ article 134.[32] The gravamen of this offense, the court stated, is the tampering with or taking of a written communication while it is in an official channel for delivery of postal matters.[33] Noting that the use of common delivery boxes for the distribution of official mail is a regular practice in the Army, the court held that mail remaining in those boxes remains within mail channels and the postal system until collected by the addressee.[34]

More recently, in *United States v. McCline*[35] the court upheld a mail-theft conviction even though the accused ordered the stolen item. The accused, a mail clerk, fraudulently ordered a ring using the name of a former member of his unit who had since left the Army. The accused claimed on appeal that, because he was the person who actually ordered the ring, he had a right to receive the package. The court rejected this argument. Stressing that the package the accused stole was registered mail, that the accused was neither the addressee nor the addressee's authorized representative, and that the accused procured the removal of the package from the unit mailroom by forgery and fraud, the court held that the accused's status as the person who actually ordered the ring was irrelevant.[36]

The Army Court of Military Review struck a discordant note, however, in *United States v. Walker*—a case now pending review by the Court of Military Appeals (CMA).[37] In *Walker* the Army court held that delivery did occur when the accused, a disciplinary barracks inmate, stole two checks deposited in a mail slot on the front door of government quarters where the accused was working on a painting detail. The quarters were assigned but unoccupied; the checks were addressed to the future occupants of the quarters. The court held that although the addressees never personally received the checks, the delivery of checks to a place designated by the addressee for the receipt of mail was sufficient to take the checks out of mail channels.[38]

The Court of Military Appeals must decide whether the accused's uncertainty about the maximum possible punishment he could have received if tried rendered his guilty pleas to larceny and mail theft improvident. The accused's confusion stems primarily from the military judge's and counsel's argument about whether the checks the accused stole were no longer mail matter at the time of the theft. This uncertainty over the status of the checks left both the gravamen of offense and the maximum possible punishment uncertain as well.

Throughout the providency hearing, judge and counsel repeatedly discussed three possible maximum sentences: ten years and six months, six years, and five and one-half years. After findings, but before sentencing, the accused remarked that he had entered into his pretrial agreement believing that he faced a maximum potential confinement of ten years and six months. Had he known that the maximum confinement actually might have been shorter, he

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[26] *Id.* at 41.

[27] *Id.*

[28] *See* Rosen v. United States, 245 U.S. 467 (1918) (deposit in a mailbox is not delivery, and the congressional intent is to extend protection to a mail depository or receptacle until its function is served); United States v. Nolan, 784 F.2d 496 (1986) (mail placed through a slot in the outer door of a duplex, which fell to the floor in a common area, was still mail matter in an authorized depository); United States v. Douglas, 668 F.2d 459 (1982)(letter clothes-pinned to a mailbox because it would not fit was not delivered because no actual receipt by the addressee occurred before it was stolen); United States v. Iverson, 637 F.2d 799 (1980)(letter properly addressed but misdelivered by postal authorities was still mail matter, even though the accused formed the intent to steal the letter only after removing it from the mailbox); United States v. Murray, 306 F. Supp. 833 (1964)(conviction for mail theft upheld when credit card mailed to former residence was stolen by new occupant).

[29] 25 M.J. 635 (A.C.M.R. 1987).

[30] *Id.* at 636.

[31] 27 M.J. 914 (A.C.M.R. 1989).

[32] *Id.* at 917.

[33] *Id.* at 916.

[34] *Id.* at 917.

[35] 32 M.J. 356 (C.M.A. 1991).

[36] *Id.* at 358.

[37] United States v. Walker, CM 66,410 (A.C.M.R. 15 Feb. 1991) (unpub.).

[38] *Id.*, slip op. at 2.

would not have accepted a pretrial agreement. The decision of the Army Court of Military Appeals gives this statement special significance. By finding that the checks were no longer in mail channels when the accused stole them, the court found the accused had committed larceny instead of mail theft. This finding effectively reduced the accused's maximum potential sentence to six years.

Defense counsel should recognize that mail-theft offenses can create a maze of possible offenses, maximum punishments, and multiplicity issues when the Government uses the same facts to charge larceny, forgery[39] or other offenses as well as mail theft. Whether these issues arise in a contested or uncontested case, they can give rise to a great deal of confusion. Before the Army Court of Military Review decided *Walker*, the general rule seemed to be that mail remains undelivered until it is in the hands of the addressee or his authorized agent. This rule is now unsettled, but the status and custody of the mail at the time of theft still determines whether the accused has committed mail theft, larceny, or wrongful appropriation—all of which have substantially different sentence ramifications.

The defense should consider litigating close cases in a separate proceeding before the accused enters a plea,[40] even if defense counsel knows that the accused eventually must plead guilty to one or more of the charges. The client has nothing to lose by challenging a mail-theft charge and well may obtain an amendment of the charges and specifications that will reduce the maximum possible sentence significantly. Captain Heaton and Mr. Gorsche, Summer Intern.

Child Sexual Abuse and Uncharged Misconduct: A Court Divided

In *United States v. Munoz*[41] the Court of Military Appeals upheld appellant's conviction of four specifications of indecent acts upon his daughter. In doing so, the sharply divided court revealed tension in what it perceived to be the proper approach to child sexual abuse cases involving uncharged misconduct. The court's three judges wrote three very different opinions.

Appellant was charged with two specifications of fondling his eleven-year-old daughter *X* by placing his hands on her breasts and vagina and two specifications of fondling her by placing his hands on her breasts. In statements and in testimony, appellant denied that the charged acts took place.

Prior to the court-martial, appellant entered a motion *in limine* to preclude the admission of any evidence of sexual misconduct between himself and his other daughters. The trial counsel intended to present the testimony of two other daughters, *Y* and *Z*, on the theory that appellant's past acts of misconduct showed appellant had formed a common scheme or plan to abuse his daughters. In support of this theory, the trial counsel claimed that in each incident, appellant became intoxicated, approached his daughters while they were alone in a room in the house, fondled them by rubbing their breasts and vagina, and ordered them not to tell anybody. The military judge admitted the testimony of the two other daughters as proof of a plan. The military judge based his ruling on the similarity of the sexual acts—that is, the fondling of the breasts and vagina—the ages of the victims at the time the accused molested them, the common situs of the offenses, the fact that third parties were present during each offense, and appellant's habit of drinking before each incident.

The trial defense counsel later renewed an objection to both *Y* and *Z*'s testimony. The military judge changed his ruling as it applied to *Y* but permitted *Z* to testify.

In her testimony, *Z* recounted several incidents in which appellant committed indecent acts *and* sodomy upon her when she was between eight and eleven years old. In some of these incidents, appellant had been drinking—in some, he had not. In some incidents, appellant sodomized *Z* orally or anally—in some, he did not. In some incidents, *Z* was completely naked—in some, she was not. At least once the accused showed *Z* pornographic material—but he did not do so in every incident.

Chief Judge Sullivan, writing the lead opinion, upheld the accused's conviction. He applied an abuse of discretion standard to the traditional analysis under Military Rule of Evidence 404(b).[42] Noting that the military judge clearly enumerated his reasons for rejecting the defense's contention that the appellant's uncharged misconduct against *Z* did not rationally reflect a plan, Chief Judge Sullivan held that the judge did not abuse his discretion. The chief judge dismissed as irrelevant the fact that the accused's sexual abuse of *Z* occurred at least twelve years before he abused the charged victim, *X*). The victims' ages at the times of the incidents were the critical factors, he held—not the period of time between the charged and uncharged acts of misconduct.

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[39]UCMJ art. 123.

[40]*See id.* art. 39(a)(1).

[41]32 M.J. 359 (C.M.A. 1991).

[42]Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 404(b) [hereinafter Mil. R. Evid. 404(b)].

The court also held the testimony in question did not require reversal of appellant's conviction under Military Rule of Evidence 403 even though the uncharged acts of sodomy were clearly more egregious and reprehensible than the charged acts of fondling. Chief Judge Sullivan suggested that the defense counsel ultimately waived this issue, even though he raised it once in a written motion and again during a pretrial hearing, because he failed to raise it in his final oral objection before Z testified.

In his concurring opinion, Judge Cox urged the court to break away from the traditional Military Rule of Evidence 404(b) analysis for child sexual abuse cases. He found that determining whether there are sufficient similarities between the charged and uncharged acts to support the claim of a common plan was unnecessary. Instead, he would have admitted any relevant evidence of uncharged sexual misconduct that would reliably corroborate the testimony of the victim, as long as the danger of unfair prejudice did not outweigh the probative value of this evidence substantially.[43] Judge Cox also questioned whether evidence about one's sexuality even should be considered character evidence, suggesting that Military Rule of Evidence 404(b) may be inapplicable in these cases.[44]

Senior Judge Everett wrote a blistering dissent, in which he declared that no theory within the scope of Military Rule of Evidence 404(b) would consider the evidence of prior sexual abuse of appellant's other daughters as relevant. Appellant's uncharged acts of sexual misconduct, which occurred twelve to fifteen years before the offenses for which the appellant was charged, were so remote in time as to be absolutely irrelevant as evidence of a common plan. According to Judge Everett, the factors the military judge used to support his ruling actually proved predisposition—which is "*precisely* the purpose to which such evidence may not be put."[45]

Munoz exposes a deep division on the court on the issue of uncharged misconduct in child sexual abuse cases. The impending personnel changes on the court leave this issue even more unsettled. Practitioners in the field should continue to raise this issue and in light of Chief Judge Sullivan's analysis should raise all appropriate objections to uncharged misconduct evidence at every opportunity. Captain Keable.

Deal From the Top of the Deck Please

In the recent case of *United States v. Hilow*,[46] the Court of Military Appeals held that the efforts by a subordinate of the convening authority deliberately to stack the pool of potential panel members in favor of commanders or supporters of a command policy of "hard discipline" violated UCMJ article 37.[47] The court went on to say that the convening authority's subsequent selection of a panel from this pool was fatally prejudicial even though the convening authority had no knowledge of the unlawful stacking and apparently complied with all the criteria of UCMJ article 25(d)(2).[48] This decision is in keeping with the position of the Court of Military Appeals that the selection of court members to secure a result in accordance with command policy is a well recognized form of unlawful command influence.[49]

Hilow pleaded guilty pursuant to a pretrial agreement. This agreement did not specifically request trial by military judge alone. The court of appeals found, however, that the record of trial established a prima-facie case of forbearance, or "nexus," suggesting that Hilow ultimately chose to proceed without a panel to avoid a court stacked with panel members who favored harsh discipline.[50]

This issue arose when, in a posttrial affidavit, the division deputy adjutant general, Captain Fierst, swore that the staff judge advocate's office directed him to "select nominees [for court-martial panels] who were commanders and supporters of a command policy of hard discipline."[51] A *DuBay* hearing convened by order of the Army Court of Military Review dismissed Captain Fierst's allegations against the staff judge advocate's office.[52] The hearing judge found, however, that Captain Fierst did nominate commanders and harsh disciplinarians,[53] and that the convening authority ultimately selected six of Captain Fierst's nominees for court-martial duty.[54]

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[43] *See Munoz*, 32 M.J. at 365. In support of his argument, Judge Cox noted that the Senate presently is considering whether to adopt a similar evidentiary rule. Proposed Federal Rule of Evidence 414 reads as follows: "In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant." *See id.* at 366 n.2.

[44] *See Munoz*, 32 M.J. at 365, n.1.

[45] *Id.* at 367.

[46] CM 63,667 (C.M.A. 11 July 1991).

[47] *Id.*, slip op. at 4.

[48] *Id.*

[49] *See, e.g.*, United States v. Smith, 27 M.J. 242 (C.M.A. 1988); United States v. McClain, 22 M.J. 124, 131 (C.M.A. 1986).

[50] *Hilow*, slip op. at 11.

[51] *Id.*, slip op. at 5.

[52] United States v. Hilow, 29 M.J. 641, 644 (A.C.M.R. 1989).

[53] *Id.*

[54] *Id.* at 643.

Sitting en banc, the Army Court of Military Review ruled that, despite Captain Fierst's unlawful attempts to stack the panel, the convening authority correctly applied article 25(d)(2) advice from the staff judge advocate and properly selected members for service on the court-martial panel.[55] Emphasizing that the convening authority was unaware of the stacking, and that the tainted list of prospective members filtered through three additional layers of command review and merged with other lists of prospective candidates before reaching the convening authority, the court ruled that any taint clearly was dissipated by the time of trial.[56]

The Court of Military Appeals refused to join in the Army court's evisceration of UCMJ articles 37 and 25(d)(2).[57] It set aside the sentence and left the finding of guilty undisturbed only because Hilow did not contend that the irregularities in the member selection process induced him to plead guilty.

Defense counsel should closely examine the nomination process used by the command in the selection of court-martial panel members. *Hilow* stands as a powerful tool to make the command deal from the top of the deck.

[55] *Id.* at 644.

[56] *Id.*

[57] *Hilow*, slip op. at 9.

Examination and New Trials Division Note

Digest: Article 69(b) Application for Relief: Larceny and Wrongful Appropriation

A recent decision by Acting The Judge Advocate General under article 69 of the Uniform Code of Military Justice may end the practice of charging soldiers who willfully fail to notify the government of an overpayment in pay or allowances with larceny or wrongful appropriation. In *United States v. Francis* the Acting The Judge Advocate General set aside the applicant's conviction for wrongful appropriation, holding that because the applicant did not fraudulently induce the government to overpay him, and had no fiduciary relationship with the government, the applicant's knowing failure to inform the government that he had been overpaid did not violate article 121.

The applicant and his family lived in government-leased quarters in Korea from December 1984 to January 1988. The applicant signed two housing statements, acknowledging receipt of government quarters shortly after his arrival in Korea, which the housing office forwarded to finance. These documents provided the finance office with ample notice that the applicant was not entitled to receive basic allowance for quarters (BAQ). Nevertheless, from December 1984 to December 1988, Army Finance erroneously paid the applicant a total of $19,000 in BAQ.

Although he knew that he was ineligible for BAQ, the applicant made no effort to stop the erroneous payments. Instead, he deposited the money in an interest-earning savings account. Eventually, the finance office discovered the error and ordered the applicant to return the money. He did so, repaying the entire $19,000 within twenty-four hours, but was subsequently charged with larceny of the BAQ overpayments and convicted of the lesser-included offense of wrongful appropriation.

The offense of larceny under article 121 encompasses three different crimes: obtaining by false pretense (wrongful obtaining with the intent to permanently defraud), embezzlement (wrongful withholding with the intent to appropriate permanently), and common-law larceny. In enacting article 121, Congress intended to proscribe only that conduct falling under one of those three headings. *See United States v. McFarland*, 23 C.M.R. 266 (C.M.A. 1957).

The applicant argued that his decision not to return the money did not fall within any of those categories. He did not "wrongfully obtain" the money, because he made no false representations to receive it. Nor did his conduct constitute a wrongful withholding because wrongful withholding, as defined by article 121, can occur only within a fiduciary relationship. *See United States v. Watkins*, 32 M.J. 527, 529 (A.C.M.R. 1991). Finally, the applicant did not commit a common-law larceny, or wrongful taking because he did not actually or constructively take the money in question from the possession of its lawful owner—the government.

The Army Court of Military Review applied article 121 to a fact pattern very similar to that in *Francis* in *United States v. Watkins*. In *Watkins* the accused pleaded guilty to wrongful appropriation of BAQ overpayments in the sum of $2288.95. As in *Francis*, the accused had received the overpayments through a finance office error—not because of a misrepresentation on her own part. The court set aside her conviction, holding, "In the absence of a fiduciary duty to account, a withholding of funds otherwise lawfully obtained is not larcenous." *Watkins*, 32 M.J. at 529.

One notable difference between *Watkins* and *Francis* was that Watkins—unlike Francis—informed Army Finance that she was erroneously receiving BAQ. Dictum

in the *Watkins* opinion strongly suggests, however, that this distinction is of no importance. The court expressed doubt that any duty to account exists when the recipient does not obtain the payment by fraud, remarking that no military cases have held that individuals who fail to inform military authorities of an overpayment of pay or allowances are criminally liable to prosecution under article 121. *Id.* As the Acting The Judge Advocate General's decision in *Francis* shows, this rationale—though dicta—is most persuasive.

The decisions in *Francis* and *Watkins* forewarn of substantial limitations on future applications of article 121. This raises the question whether another article under the UCMJ could be used to make a case. In light of the court's reasoning in *Watkins*, article 92 (dereliction of duty) would not appear to provide an alternative means of charging the intentional failure to return an overpayment from the government. Were the accused an officer, the government might charge a violation of article 133 (conduct unbecoming an officer and a gentleman), provided the trial counsel could establish that the failure to return a known overpayment was immoral or constituted an act of dishonesty and unfair dealing. This charge, however, can be applied only to a minority of potential offenders. Could an imaginative trial counsel make a case under article 134? This approach is perhaps the most promising of those now available. Even so, to prevail, the Government would need strong evidence that the recipient's intentional failure to return the overpayment was contrary to good order and discipline or was service-discrediting. Captain Trebilcock.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

United States Supreme Court Abandons Fourth Amendment "Free to Leave" Test for Police-Citizen Contacts in *Florida v. Bostick*

In *Florida v. Bostick*[1] the Supreme Court may have rendered its most far-reaching fourth amendment decision of this term. In *Bostick* the Court significantly modified the test it has used for over twenty years to determine when a seizure occurs during an encounter between a police officer and a citizen.

Starting with *Terry v. Ohio*[2] in 1968, and continuing in cases like *Florida v. Royer*,[3] *Florida v. Rodriguez*,[4] and *United States v. Mendenhall*,[5] the Supreme Court has ruled repeatedly that a seizure within the meaning of the fourth amendment does not occur when a police officer "merely approach[es] an individual on the street or in another public place"[6] and asks that person some questions. "Only when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen"[7] does a seizure occur. As the Court stated in *Michigan v. Chesternut*[8] in 1988, these police-citizen encounters are seizures only if "a reasonable person would believe he or she is not "free to leave".[9]

As recently as this year, in *California v. Hodari D.*[10], the Court reaffirmed that the test is whether a reasonable person would feel free "to disregard the police and go about his business."[11] If a citizen feels free to leave the encounter, no seizure has occurred. If no seizure occurs, then the fourth amendment is inapplicable, and any attempt by the police to stop the citizen for questioning or to obtain the citizen's consent to a search does not need to be based upon probable cause or reasonable suspicion.

In *Bostick* the Supreme Court abandoned the "free to leave" standard. It held instead that the critical issue to be determined is whether a reasonable person would have felt free to stop answering questions, to refuse a request to search his property, or to otherwise end the encounter. This change is an important development because it carves out a new area in which police and citizen contacts do not trigger the fourth amendment. More important yet, this decision raises a critical question: To what extent will the new test apply beyond the factual setting in *Bostick*? Is the test limited to bus-stop encounters, or does it apply to encounters between police and citizens on trains and aircraft as well? Should this test be used when a police officer casually questions a person on the street?

[1] 49 Crim. L. Rep. 2269 (June 19, 1991).
[2] 392 U.S. 1 (1968).
[3] 460 U.S. 491 (1983).
[4] 469 U.S. 1 (1984).
[5] 446 U.S. 544 (1980).
[6] *Royer*, 460 U.S. at 497.
[7] *Terry*, 392 U.S. at 19 n.16.
[8] 486 U.S. 567 (1988).
[9] *Id.* at 573.
[10] 111 S. Ct. 1547 (1991).
[11] *Id.* at 1553.

Terrance Bostick was a ticketed passenger on a bus travelling from Miami to Atlanta. When the bus stopped in Fort Lauderdale, Florida, two police officers wearing badges and insignia boarded the bus. One of the officers had a zipper pouch containing a pistol, which the passengers on the bus could see. Although they had no reason to suspect Bostick of any wrongdoing, the police approached him and asked him to show them his ticket and personal identification. Bostick complied. His ticket and identification matched, but the two police officers continued to talk to Bostick. They told him that they were looking for illegal drugs and asked him if he would allow them to search his luggage. Although the officers apparently did tell him that he had the right to refuse, Bostick decided to permit the search. The police found a quantity of cocaine in one of his bags, and apprehended him.

At trial, Bostick moved to suppress the cocaine on the grounds that it was the fruit of an illegal seizure. Stating that the police had had no articulable reason for boarding the bus to talk with him, he claimed that an illegal seizure of his person occurred because "a reasonable passenger in his situation would not have felt free to leave the bus to avoid questioning by the police."[12] The trial judge rejected Bostick's argument. The intermediate appellate court affirmed, but certified the question to the Florida Supreme Court. That court reversed, holding that a police bus-stop search for drugs is an impermissible seizure and is per se unconstitutional under the fourth amendment. The United States Supreme Court reversed this decision.

Justice O'Connor, writing for the six-justice majority, compared the encounter between Bostick and the police to the encounters between Immigration and Naturalization Service (INS) agents and factory workers in *INS v. Delgado*[13]. In *Delgado* INS agents visited factories at random and questioned workers to see if any were illegal aliens. Some INS employees would station themselves at the building's exits to prevent any employees from leaving before the INS had questioned them. Reviewing these facts, the Court recognized that the workers were not free to leave the factory without being questioned. It held, however, that this INS-worker encounter was not a seizure because the INS agents' actions did not give the workers any "reason to believe that they would be detained if they gave truthful answers to the questions put to them *or if they simply refused to answer*."[14] By analogy, Justice O'Connor reasoned, the police officers' confrontation with Bostick also fell short of a seizure. The circumstances, were substantially the same. Nothing the police did in approaching Bostick would have made a reasonable person think "he was not at liberty to ignore the police presence and go about his business."[15] Nor were space limitations on the bus a deciding factor. The bus' cramped confines "are [only] one relevant factor that should be considered in evaluating whether a passenger's consent is voluntary"[16] Concluding that Bostick remained on the bus because he feared that if he got off to end his contact with the police, the bus might depart the terminal without him, Justice O'Connor ruled that the primary restraint on Terrance Bostick's freedom of movement was Bostick's own desire to continue to ride the bus to Atlanta. Under these circumstances, Justice O'Connor reasoned, the proper test was not whether Bostick was "free to leave" the bus, but whether a reasonable person would have thought he was free to stop answering police questions, and refuse to consent to a search.

How far does the new test in *Bostick* extend? One certainly could argue that *Bostick* extends to all citizen-police encounters because Justice O'Connor's opinion expressly states that "whether a reasonable person would have felt free to decline the officers' requests or otherwise terminate the encounter ... applies equally to police encounters that take place on trains, planes, and city streets."[17] The better analysis, however, would restrict the rule in *Bostick* to situations in which a police-citizen encounter takes place in a bus, train, plane, or some other setting analogous to the factory area in *Delgado*. Only when a person feels constrained to remain in a place because he or she *wishes* to remain in that place without any additional restraint or pressure by police, should the new rule in *Bostick* apply. The old "free to leave" test still should apply to situations in which this type of self-constraint does not exist, such as street encounters between police and citizens.

Florida v. Bostick is yet another fourth amendment decision in which the terms "probable cause" and "reasonable suspicion" are no longer relevant. Instead, it marks a continuation of the Supreme Court's trend of focusing on the reasonableness clause of the fourth amendment. Major Borch.

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[12] *Bostick*, 49 Crim. L. Rep. at 2271 (quoting 554 So. 2d, at 1154).

[13] 466 U.S. 210 (1984).

[14] 49 Crim. L. Rep. at 2272 (emphasis added).

[15] *Id.*

[16] *Id.*

[17] *Id.*

Pretrial Statements by Counsel—an Ethical and Constitutional Dilemma

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process thereof.[18]

Assume you are a defense counsel and you honestly believe the Government wrongfully has charged your client with committing an offense. If you make statements to the news media expressing your client's innocence, have you violated this ethical rule? If your supervising bar authority disciplines you for violating the ethical rule, has your constitutional right of free speech been infringed improperly? The Supreme Court recently addressed these issues in *Gentile v. Nevada State Bar*.[19]

The Facts

Dominic Gentile represented a client charged with the highly publicized theft of $300,000 and nine pounds of cocaine from a safety deposit box used in an undercover operation. After the grand jury indicted his client, Mr. Gentile called a news conference to offset the adverse publicity in the case. At the news conference, Mr. Gentile stated that he represented an innocent person, that the person in the best position to have stolen the items was the police detective assigned to the undercover operation, and that the victims of the theft were not credible because most of them were drug dealers or convicted money launderers.

The Nevada Supreme Court earlier had adopted an ethical rule substantially similar to the rule cited above.[20] This rule, accordingly, governed Mr. Gentile's statements and conduct. The Nevada rule, like Army Rule of Professional Conduct for Lawyers 3.6, specifically provides that statements relating to "the character, credibility, reputation, or criminal record of a party ... or witness ... [and] any opinion as to the guilt or innocence of an accused ...." are "ordinarily ... likely" to materially prejudice a judicial proceeding.[21] Mr. Gentile, however, believed that his statement was authorized by a "safe harbor" provision, which appears in both versions of the ethical rule. This provision permits a lawyer involved in the investigation or litigation of a matter to state, without elaboration, the general nature of the defense.[22]

Mr. Gentile's statements may have been correct—six months later, a trial court acquitted his client of all charges. The Nevada State Bar, however, did not agree with his interpretation of the safe harbor provision. The bar initiated disciplinary proceedings against Mr. Gentile and eventually reprimanded him for violating the ethical rule on tribunal publicity. The Nevada Supreme Court upheld the bar's decision, ruling that Mr. Gentile should have known that his statements were substantially likely to prejudice the trial materially.[23] The United States Supreme Court granted certiorari and reversed the Nevada court.

The Holding

A divided Supreme Court essentially made two distinct holdings. First, the Nevada rule strikes a proper balance between the First Amendment rights of lawyers and the government's interest in obtaining fair trials. Second, the rule's safe harbor provision is unconstitutionally vague.

First Amendment Issue

Mr. Gentile contended that the language of the Nevada rule impermissibly restricted his constitutional right to free speech. He compared his case to *Nebraska Press Association v. Stuart*,[24] in which the Court held that the government improperly suppressed comments by the news media about judicial proceedings. The same standard, he argued, should apply to a defense attorney's public statements on behalf of a client. Unless the government can prove that these statements would "so distort the views of potential jurors that 12 could not be found who would ... fulfill their sworn duty to render a

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[18] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers, Rule 3.6(a) (31 Dec. 1987) [hereinafter rule 3.6].

[19] 111 S. Ct. 2720 (1991).

[20] *See* Nev. Sup. Ct. R. 177 (1988) [hereinafter SCR 177].

[21] SCR 177(2); *see also* rule 3.6(b)(1), 3.6(b)(4). The Nevada and Army ethical rules are patterned after the ABA Model Rules of Professional Conduct. The language concerning tribunal publicity is almost identical in each of the three sets of rules.

[22] Rule 3.6(c); *see also* SCR 177(3). The safe-harbor provision expressly states that "notwithstanding" rule 3.6(a) and rule 3.6(b) "a lawyer involved in the investigation or litigation of a matter may state, without elaboration, ... the general nature of the defense ...." Rule 3.6(c)(1); *accord* SCR 177(3).

[23] Gentile v. Nevada State Bar, 106 Nev. 60, 787 P.2d 386 (1990).

[24] 427 U.S. 539, 569 (1976).

just verdict,"[25] the attorney's freedom of speech must be protected.

Chief Justice Rehnquist, with Justices White, Scalia, Souter, and O'Connor joining in his opinion, rejected Mr. Gentile's argument. The Court stated that lawyers are key participants in the criminal justice system and have special access to inside information through the discovery process and client communications. As a result, a lawyer's extrajudicial statements are likely to be perceived as "especially authoritative" and therefore pose a threat to the fairness of the pending proceeding.

The Court indicated that the Nevada rule's regulation of an attorney's speech was intended to counter two primary evils: (1) comments likely to influence the outcome of the trial; and (2) comments which are likely to prejudice the jury venire. This regulation of speech exists to safeguard a fundamental constitutional right—the right to a fair trial by an impartial jury. The Court viewed the ethical rule as striking a proper balance between the two constitutional rights of free speech and fair trial, noting that the rule's restraint on speech is tailored narrowly to apply only to speech that is substantially likely to prejudice a judicial proceeding materially. The rule's identification of certain statements as tending to have a prejudicial effect does not mean that an attorney who makes any of these statements automatically will be held to have violated the rule; the rule states only that the listed statements "ordinarily" are likely to have the adverse effect that the rule prohibits. Before disciplinary action may be taken against an attorney, the appropriate disciplinary authority must establish the "substantial likelihood" that the attorney's comments would prejudice the proceeding to which they related.

The "Safe-Harbor" Provision

Justice Kennedy, with Justices Marshall, Blackmun, Stevens, and O'Connor joining in the opinion, reversed the decision of the Nevada Supreme Court upholding the reprimand of Mr. Gentile. The Court stated that if assigned their common meaning, the words in the safe harbor provision contemplate that a defense lawyer ethically can describe the general nature of his client's defense and comment on the credibility of witnesses and the guilt or innocence of an accused, even if the lawyer knows or reasonably should know these statements would materially prejudice the proceedings. Given the grammatical structure of the provision—especially the introductory word, "notwithstanding"—the justices believed that the language of the safe harbor provision did not give Mr. Gentile fair notice of the extent of the protection the rule actually provided him. They held that a rule permitting an attorney to explain the "general" nature of a defense, provided he or she does so without "elaboration," provides insufficient guidance to the attorney. Because these words are classic terms of degree, they leave lawyers with "no principle for determining when [their] remarks pass from the safe harbor of the general to the forbidden sea of the elaborated."

Application to the Army and Conclusion

Because the Nevada rule is virtually identical to the Army ethical rule governing tribunal publicity, the *Gentile* decision presumably would be equally applicable to cases involving Army attorneys. *Gentile* certainly appears to imply that the "safe harbor" provision of Army Rule of Professional Conduct for Lawyers 3.6(c) provides Army defense counsel with an almost unlimited immunity for statements they make to the media about the pending defense of their clients. Appearances, however, may be deceiving. Army counsel must bear in mind that the Army ethical rule is not the only constraint on pretrial extrajudicial statements. Army attorneys are restricted further by regulatory prohibitions[26] and policy guidance from The Judge Advocate General.[27] *Gentile* provides no answer on whether these further restrictions imposed by the Army on an attorney's extrajudicial pretrial statements can pass constitutional muster. Lieutenant Colonel Holland.

The New Rule Against Polygraphs

Over the past few years, military practitioners have met with some success in introducing polygraph results at courts-martial. Applicable rules of evidence[28] appeared to permit introduction of polygraph results if they were shown to be relevant, helpful, and probative. Case law required military judges to allow attempts by counsel to

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[25] *Id.*

[26] *See, e.g.*, Army Reg. 25-55, The Department of the Army Freedom of Information Act Program, para. 5-101d (10 Jan. 1990)(absolutely prohibiting the release of any information about the credibility of witnesses or the accused).

[27] Policy Letter 91-2, Office of The Judge Advocate General, U.S. Army, subject: Relations with News Media, 16 Apr. 1991, *reprinted in* The Army Lawyer, May 1991, at 4. This memorandum essentially prohibits counsel from preparing written statements for publication or permitting himself or herself to be quoted by the media about a case without first obtaining approval from applicable authority, such as the staff judge advocate or the Chief, U.S. Army Trial Defense Service.

[28] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 401, 402, 702 [hereinafter Mil. R. Evid.].

lay the necessary foundation.[29] Several opinions by military courts reflected an assumption that, with a proper foundation, polygraph evidence was admissible.[30] The increased acceptance of polygraph evidence in military courts matched a developing trend in the federal sector.[31]

In the face of these developments, the military recently adopted Military Rule of Evidence 707[32], a per se rule prohibiting the use of polygraph evidence at courts-martial. The new rule forbids use of the results of a polygraph test, even when both parties are willing to stipulate to these results. The rule applies in all cases in which arraignment has been completed on or after 6 July 1991.

Counsel must understand that the new rule will not exclude any statements a person may make before, during, or after the mechanical test, if those statements are otherwise admissible. Only the results of the polygraph examination, the opinions of the examiner, and references to the polygraph examination itself must be excluded.

The analysis to the new rule cites several policy considerations for excluding polygraph evidence in courts-martial. First, the drafters felt court members could be misled by polygraph evidence, or by a mistaken belief in the polygraph's infallibility. This could lead court members to disregard cautionary instructions from the bench and to abandon their responsibilities to determine the facts. Similarly, the drafters felt court-members might focus on the validity of polygraphs in general rather than on the guilt or innocence of the accused, thereby confusing the real issues. Further, the drafters believed that litigation of operator qualifications and machine reliability would waste a substantial amount of court time. They deemed these burdens on the system to outweigh any probative value of the evidence. Finally, the drafters were dissatisfied with the reliability of polygraph examinations. They decided that, overall, the use of polygraph evidence in criminal proceedings adversely impinges upon the integrity of the judicial system.

Does this rule sound the death knell for polygraphy in the military? It does not. The polygraph will continue to be an investigative tool and, undoubtedly, government polygraphers will continue to use results of polygraph examinations to obtain admissible statements. Moreover, the convening authority still may consider the results of a polygraph examination in deciding how to dispose of a case. On its face, however, the new rule effectively precludes further use of polygraph evidence at trial.

The new rule may be vulnerable to challenge. If an accused needs to admit an exculpatory polygraph—especially when he or she can present no other defense—the defense counsel may be able to attack this per se rule of inadmissibility on grounds that it unconstitutionally impinges on the accused's sixth amendment right to present a defense. The Court of Military Appeals has recognized the argument that the accused has an independent, constitutional right to present exculpatory evidence[33]—to include favorable polygraph evidence.[34] Although, to date, the court has rejected this theory of admissibility, it has done so only on the grounds that the evidence in question was not relevant. "[T]here can be no right to present evidence—however it purports to exonerate an accused—unless it is shown to be relevant and helpful. When evidence meets these criteria, no additional justification for admissibility is necessary."[35] Accordingly, if the accused can lay a foundation showing that polygraph evidence is not only exculpatory, but also relevant, helpful, and probative, the court then may be willing to accept the argument for a constitutional right to present the evidence despite a contrary rule of evidence. Major Warner.

Contract Law Note

Sample Tasks in Evaluation of Proposals

Has your organization ever made an award in a negotiated procurement to a technically superior proposal, only to find after award that the contractor's performance did not mirror its slick, well-written proposal? Contracting activities frequently find that some companies employ very good proposal writers, while assigning less effective personnel to perform the work. The levels of their per-

[29] United States v. Gipson, 24 M.J. 246 (C.M.A. 1987).

[30] *See, e.g.*, United States v. Abeyta, 25 M.J. 97 (C.M.A. 1987); United States v. West, 27 M.J. 223 (C.M.A. 1988); United States v. Berg, 28 M.J. 567 (N.M.C.M.R. 1989).

[31] *See* United States v. Piccinonna, 885 F.2d 1529 (11th Cir. 1989).

[32] Military Rule of Evidence 707 provides, in pertinent part:

> (A) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph, shall not be admitted into evidence.
>
> (B) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

[33] *Gipson*, 24 M.J. at 252. The court stated this theory derives from Chambers v. Mississippi, 410 U.S. 284 (1973) and Washington v. Texas, 388 U.S. 14 (1967).

[34] *Id.* (citing P. Giannelli and E. Imwinkelreid, Scientific Evidence 257 (1986)).

[35] *Gipson*, 24 M.J. at 252 (C.M.A. 1987).

formance may not fall below their contracts' requirements, but the qualities of performance simply do not justify their contract prices. Does the agency have some way to prevent this before award? Some contracting activities have done so by using sample problems or hypothetical tasks to measure the offeror's technical competence, understanding of the requirements, and other evaluation criteria. In certain acquisitions, use of sample tasks may prove helpful to your agency as well.

Contracting activities commonly use sample tasks in solicitations for engineering support services or in other acquisitions that require the contractor to use highly skilled employees. In these acquisitions, the use of sample tasks aids the contracting activity in evaluating the technical competence of the personnel the offeror intends to use to perform the requirement. The use of sample tasks, moreover, induces the offeror to provide a sample of its work, which permits the agency to evaluate how well the offeror understands the government's requirements. Sample tasks also are useful for evaluating an offeror in nontechnical areas. When used in this manner, the sample task motivates the offeror to describe in precise detail how it will manage the work required by the task, the resources it will devote to performing the task, and how it will monitor progress.

The contracting activity should include sample tasks in the solicitation it provides to the offerors. Each task should describe work within the scope of the contract that is typical of work that the offeror will perform if awarded the contract. The solicitation should describe what information, if any, the offeror should submit to the government in response to the sample task. The desired responses may range from describing in detail how the offeror would perform the task, to actually performing the sample task. Thus, sample tasks are much like bid samples and preaward benchmark testing. They are tools for detecting potential performance problems before award.

Agencies should take several considerations into account when preparing sample tasks and the sample responses they intend to use to evaluate the offerors' responses. First, the tasks should not require the offerors to exceed the scope of work of the contract. Elements of each task should correlate directly to the minimum technical requirements expressed in the statement of work or the specifications. Otherwise, a disappointed offeror may challenge the use of the sample task, claiming that the task has no rational relationship to the requirements sought. The sample task, however, may permit the various offerors to exceed contract standards to prove that they can provide technical quality beyond the minimum specified in the scope of work. Second, the agency's evaluations of the sample tasks should not distort the relative importance of the disclosed evaluation criteria or introduce an undisclosed evaluation criterion into the evaluation process. The contracting agency can prevent a great deal of confusion and ill feeling by clearly disclosing what the government will consider in evaluating responses to sample tasks. Third, the sample tasks should not place a burden on potential competitors that will restrict competition unreasonably. Finally, when drafting sample answers, the agency should bear in mind that different contractors may propose different solutions, and that more than one of these solutions may satisfy the government's requirements. A sample answer that is too subjective or limited may lead evaluators short-sightedly to reject innovative solutions.

One recurring question arising from the use of sample tasks is whether the contracting agency should discuss sample tasks with offerors who fall into the competitive range. The primary purpose of using a sample task is to assess an offeror's technical competence and understanding of the stated requirements. Should the contracting officer point out problems with an offeror's response to the sample task and permit the offeror to revise its response? How will this affect the accuracy of the sample tasking procedure? Some contracting activities conclude that discussions would defeat the purpose of having a sample task and ultimately would result in technical leveling if the agency were to disclose deficiencies in responses to offerors and were to allow them to correct their answers. This concern is not without merit. Clearly, any revised response by the offeror would reflect the expertise and understanding, not only of the offeror, but also of the government evaluator. Failure to discuss the offeror's response to the task, however, raises another specter—the possibility that a disgruntled offeror successfully will challenge a contracting decision on the basis of inadequate discussion.

Recent General Accounting Office (GAO) decisions alleviate this concern. In *Modern Technologies Corporation; Scientific Systems Company*,[36] the GAO held that a contracting agency is not required to conduct discussions on sample tasks. The agency in question used sample tasks to evaluate proposals received for a time and materials contract for engineering services. It did not allow revision of sample problem responses and relied on a pass-fail scoring scheme in evaluating the sample problem responses. The GAO agreed with the agency's assertion that permitting revisions of responses to sample tasks would have defeated the agency's goal of assessing the offerors' abilities to independently evaluate problems and develop solutions. Under these circumstances, the GAO held that the agency properly limited discussions of sample tasks.

[36]Comp. Gen Dec. B-236961.5 (Mar. 19, 1990), 90-1 CPD ¶ 301.

In another engineering support services effort, a rejected offeror forced the Navy to defend its decision to curtail discussions on sample tasks provided to offerors. In *Technology Applications, Inc.*[37] the Navy contracting activity commented upon the offerors' initial responses to the sample tasks, but did not allow the offerors to make revisions in response to these comments. The protester argued, inter alia, that the Navy's comments concerning the protester's response were so vague as to be meaningless. Reviewing this complaint, the GAO stated that one purpose of using sample tasks is to determine an offeror's understanding of the technical requirements of a contemplated contract. Accordingly, an agency need not spell out to an offeror all the weaknesses in its task responses. The GAO found that, had the Navy been more specific, it would have defeated the purpose of the sample problem.

In light of *Technology Applications*, a contracting activity may wish to adopt an approach in which it directs an offeror's attention to deficient areas identified through the sample task and response, without permitting the offeror to correct these deficiencies. Instead, the activity would permit the offeror to revise other aspects of its proposal, if appropriate. For example, if the sample response revealed that the offeror's work force was inefficient, then the offeror's revised proposal could address improving work force efficiency.

Another approach, mentioned in the *Modern Technologies Corp.* decision, is the use of a qualified pass-fail scoring scheme. In *Modern Technology Corp.* the agency evaluated offerors' sample task responses on a pass-fail basis, but stated in its solicitation that failure of the sample problem alone would not preclude award. This qualification of pass-fail evaluation criteria is significant because, on several other occasions, the GAO has ruled that use of pass-fail evaluation criteria is completely inconsistent with negotiated procurement. The GAO consistently has struck down awards relying on pass-fail criteria, essentially holding that this approach reduces the evaluation process to an overly simplistic sealed bidding responsiveness environment. That environment, the GAO has held, runs contrary to the nature of a negotiated procurement, which normally allows meaningful discussion of proposals.[38] Although the GAO does not address this issue directly in *Modern Technology Corp.*, the agency's decision in that case not to base award solely on the offerors' responses to the sample task apparently salvaged an otherwise impermissable use of sample tasks.

In light of the GAO's concerns over pass-fail evaluation in negotiated procurements, a contracting activity should be reluctant to use this criterion. Instead, the agency should evaluate responses to sample tasks using a scoring scheme that provides for graduated scores.

The *Modern Technology Corp.* and *Technology Applications* decisions demonstrate that a contracting activity has broad discretion in determining how extensive its discussion of sample tasks must be, or if any discussions at all need to be entertained. The activity must take care to disclose fully how it will evaluate sample tasks. Full disclosure permits offerors to compete on an equal basis, ensures that they understand how the activity intends to use the tasks to evaluate their proposals, and forestalls their allegations that the agency used secret criteria or did not conduct meaningful discussions. Major Bean, USAR, and Lieutenant Colonel Jones.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Family Law Note

Support of Stepchildren

Almost half of all American marriages end in divorce. As a result, an increasing number of children in two-parent households live with one parent to whom they are not related biologically. Whether or not the stepparent is obligated to pay for the support of these children depends on several factors: (1) whether the child is adopted by the stepparent; (2) the laws of the domiciles[39] of the stepparent and stepchild; and (3) the conduct of the stepparent towards the child.

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[37] Comp. Gen. Dec. B-238259 (May 4, 1990), 90-1 CPD ¶ 451.

[38] *See* OAO Corp.; 21st Century Robotics, Inc., Comp. Gen. Dec. B-232216, B-232216.2 (Dec. 1, 1988), 88-2 CPD ¶ 546; Princeton Gamma-Tech, Inc., Comp. Gen Dec. B-228052.2 (February 17, 1988), 88-1 CPD ¶ 175.

[39] Every person has a domicile. By general acceptance, however, the term "domicile" is not synonymous to residence. The critical factor in determining a person's domicile is whether or not the subject intended to make a particular place "his [or her] home for the time at least." Restatement (Second) of Conflict of Laws § 18 (1971). Many persons mistakenly believe that a soldier's domicile is the same as his or her home of record, but this is not always the case. Intent to establish domicile usually is expressed by a subject's: (1) paying local and state income taxes; (2) paying local or state property taxes; (3) registering to vote in the state; (4) obtaining state driver and vehicle licenses; or (5) committing any other act that signifies an intention to make a particular state a permanent home.

Some stepparents adopt their stepchildren. As a matter of law, adopted children generally are treated as if they were the biological children of their adoptive parents.[40] Army regulations, for example, recognize a child adopted by a soldier to be a "family member" of that soldier.[41] As a family member, the adopted child is entitled to regular and adequate financial support from the soldier, unless the soldier is relieved of that responsibility by a court order or in an agreement with the child's custodial parent.[42]

If the soldier has not adopted his or her stepchild, the child will be considered to be the soldier's family member only if the laws of either the soldier's or stepchild's respective domiciles require stepparents to provide financial support to their stepchildren.[43] Accordingly, a soldier's obligation to support a stepchild may be created or extinguished by a change of domicile by either the soldier or the stepchild. Courts in at least eight states have held stepparents liable for the support of their stepchildren,[44] and several other jurisdictions have imposed this obligation by statute.[45]

A stepparent's conduct relative to the stepchild may result in the stepparent being held liable for the child's support through application of the equitable estoppel doctrine. As might be expected, equitable estoppel is not triggered merely by a stepparent's promise to love the stepchild.[46] Instead, courts typically require the following: (1) the stepparent must express an unequivocal intent to support the child; (2) the child or the child's natural parent reasonably must rely on that representation; and (3) this reliance must result in some detriment to the natural parent or to the child.[47]

Unequivocal intent to support the stepchild generally may be proven by showing that the stepparent has provided the child with long-term support and has permitted or encouraged the child to use the stepparent's last name.[48] Proving detrimental reliance by the biological parent or stepchild is often more difficult.[49] One court, however, found detrimental reliance when the stepparent paid for the termination of his stepchild's biological father's parental rights, then failed to provide support.[50] Major Connor.

Tax Note

IRA Contributions by Desert Storm Personnel

The Internal Revenue Service (IRS) recently issued Notice 91-17, Reporting Instructions Concerning Desert Storm Individual Retirement Arrangement (IRA) Contributions.[51] This notice outlines reporting procedures for IRA contributions by Operation Desert Shield and Desert Storm personnel, and highlights the ways that the Internal Revenue Code (IRC) section 7508[52] combat zone designation and the return filing deadline suspension affect these contributions.

IRC section 7508 suspends the deadline date for income tax return filing and other related acts[53] for individuals serving in "combat zones."[54] This suspension is effective for the duration of combat zone service and for an additional 180 days after the soldier-taxpayer departs the combat zone.[55]

Under IRC section 219(f)(3),[56] an individual may receive credit for contributing to an IRA during the preceding tax year if he or she makes this contribution on or before the date the income tax return for that year is due.

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[40] 2 H. Clark, The Law of Domestic Relations in the United States § 21.12 (1987).

[41] Army Reg. 608-99, Family Support, Child Custody, and Paternity, glossary (22 May 1987) [hereinafter AR 608-99].

[42] *See generally id.*, chap. 2.

[43] *Id.*, glossary.

[44] *See* Johnson v. Johnson, 152 Cal. Rptr. 121 (Ct. App. 1979); Wade v. Wade, 536 So. 2d 1158 (Fla. Dist. Ct. App. 1988); Nygard v. Nygard, 401 N.W.2d 323 (Mich. Ct. App. 1986); M.H.B. v. H.T.B., 498 A.2d 775 (N.J. Sup. Ct. 1985); Wener v. Wener, 312 N.Y.S.2d 815 (N.Y. App. Div. 1970); Manze v. Manze, 523 A.2d 821 (Pa. 1987); T. v. T., 224 S.E.2d 148 (Va. 1976); K.T. v. L.T., 387 S.E.2d 866 (W. Va. 1989).

[45] *See, e.g.*, S.D. Codified. Laws Ann. § 25-7-9 (1990); Wash. Rev. Code Ann. § 26.16.205 (West Supp. 1989).

[46] *See, e.g.*, A.M.N. v. A.J.N., 414 N.W.2d 68 (Wis. Ct. App. 1987).

[47] *Id.* at 71; *see also* Knill v. Knill, 510 A.2d 546 (Md. 1986); Mace v. Webb, 614 P.2d 647 (Utah 1980).

[48] Ulrich v. Cornell, 17 Fam. L. Rep. 1371 (BNA) (Wis. Ct. App. May 28, 1991).

[49] *See, e.g.*, Wiese v. Wiese, 699 P.2d 700 (Utah 1985).

[50] *Ulrich*, 17 Fam. L. Rep. at 1371.

[51] I.R.S. Notice 91-17, 1991-23 I.R. 25 (June 10, 1991) [hereinafter Notice 91-17].

[52] I.R.C. § 7508 (Maxwell Macmillan 1991).

[53] I.R.S., Pub. 945, Tax Information for Those Affected by Operation Desert Storm (1991) [hereinafter I.R.S. Pub. 945] (describing the tax benefits available to those involved in Operation Desert Shield and Desert Storm). This publication indicates that the deadline for paying taxes and filing claims for refund also are extended for those taxpayers serving in the armed forces in a combat zone. *Id.* at 3.

[54] Exec. Order No. 12744, *reprinted in* 56 Fed. Reg. 2661 (1991). President Bush designated the following locations—including airspace—as a combat zone beginning January 17, 1991: the Persian Gulf; the Red Sea; the Gulf of Oman; the Gulf of Aden; the total land areas of Iraq, Kuwait, Saudi Arabia, Oman, Bahrain, Qatar, and the United Arab Emirates; and the part of the Arabian Sea that is north of 10 degrees north latitude and west of 68 degrees east longitude.

[55] I.R.S. Publication 945. The deadline is extended further by the number of days left to take the action with the IRS when the individual entered a combat zone in addition to the 180 days extension. For example, a soldier entering the combat zone on February 1, 1991, had two and one-half months to file his 1990 federal tax return (April 15, 1991 due date). The 180-day combat zone extension would be extended by the two and one-half months remaining when the soldier entered the combat zone, effectively giving the soldier eight and one-half months to file his or her 1990 federal tax return.

[56] I.R.C. § 219(f)(3) (Maxwell Macmillan 1991).

The due date is determined without regard to extensions. For example, a contribution made on April 14, 1991, by a calendar year taxpayer, could be designated as a contribution for the 1990 tax year. On the other hand, a contribution made on April 20, 1991, could not be counted as a 1990 IRA contribution, even if the taxpayer obtained an extension to file his 1990 federal income tax return.

The section 7508 "combat zone" filing deadline *suspension*, however, provides the taxpayer with an additional period in which to make a contribution to an IRA for the preceding tax year. To qualify, the taxpayer must make the contribution before the earlier of the end of the income tax return filing period established under section 7508 or the date on which the federal income tax return actually is filed. The notice points out that a contribution made on June 1, 1991, could be designated as a contribution for the 1990 tax year if it is made before the taxpayer's combat zone suspension period expires. The taxpayer would have to designate the contribution as a contribution for the 1990 tax year to claim it on his or her 1990 income tax return.

Desert Storm personnel making contributions during the section 7508 suspension period must comply with special reporting requirements. The IRA trustee must report the contribution on IRS Form 5498, "Individual Retirement Arrangement Information," in one of two ways—either for the year prior to the year in which the contribution was made or for a subsequent year, depending upon the contributor's intention.[57] Soldiers who accumulated pay while assigned to a combat zone may find making IRA contributions for both 1990 and 1991 out of the accumulated pay financially advantageous. Major Hancock.

Savings Bonds

Clients often ask legal assistance attorneys about savings bonds when seeking tax advice, during the preparation of wills, or in estate and financial planning discussions. Two details attorneys must address when responding to these questions are income tax liability on bonds registered in co-ownership form, and bond redemption values.[58]

Tax Liability

The interest on all United States savings bonds issued since March 1, 1941, is subject to federal income tax, but not state, municipal, or local taxes. Series E and EE bond holders—on a cash basis, as opposed to accrual basis for income tax purposes—may report interest income when they redeem the bond or at the bond's maturity, paying a lump sum at that time on the accumulated interest. Alternatively, they may report and pay the accrued interest annually. Most soldiers find reporting the interest income when the bond matures or is redeemed more advantageous.

The table below[59] summarizes the federal income tax liability on savings bonds registered in co-ownership form and cashed during the lifetimes of both co-owners:

How Purchased	Who is Liable for Tax
A buys bond in name of *A* and *B* as co-owners.	Interest is taxable solely as income to *A* because *A* contributed the entire purchase price.
A and *B* buy bonds in co-ownership, each contributing part of the purchase price.	Interest is taxable as income to both *A* and *B* in proportion to their contributions to the purchase price.
A and *B* receive bonds in co-ownership as a gift from *C*.	Interest is taxable as income to both *A* and *B*—each co-owner is liable for one half of the income.

Partial Redemption

Soldiers who wish to redeem savings bonds have the option to redeem them partially instead.[60] Savings bonds issued in a face amount of $100 or more may be partially redeemed prior to maturity at the redemption value current when the bond is surrendered. For example, a bond owner may surrender a $100 EE bond in exchange for a fifty dollar face amount EE bond and receive payment equal to the redemption value of a fifty dollar bond

[57] Notice 91-17 provides specific instructions for reporting contributions made in one year that are intended as contributions for a different year. The notice directs the trustee to enter "DS the year the amount" in any of the empty boxes on IRS Form 5498. Notice 91-17 provides this example: If an individual makes a permissible $2000 IRA contribution on January 15, 1992, for tax year 1990, the trustee should enter "DS 1990 $2000" in the empty boxes on either the 1991 or 1992 IRS Form 5498.

[58] *See* Note, U.S. Savings Bonds: An Old Reliable, Now Even More Attractive, The Army Lawyer, Jan. 1990, at 42, for a discussion on the education tax exclusion use of savings bonds.

[59] The table is reproduced from Dep't of Treasury, Pub. SBD-1984, "Legal Aspects of United States Savings Bonds," (June 1990).

[60] *See* 31 C.F.R. § 315.41 (1990).

having the same issue date as the surrendered $100 bond. The new bond, fifty dollars face amount, would have the same issue date as the original $100 bond.

Soldiers desiring to redeem bonds partially should contact a Federal Reserve bank, or the Savings Bond Office of the Bureau of the Public Debt, Parkersburg, West Virginia 26106-1328. To indicate that they wish a partial redemption, soldiers should include in their redemption requests the phrase, "redeem to the extent of $___ (specified face amount) and reissue the remainder."

Redemption Tables

Clients also inquire about redemption values on savings bonds. The Bureau of the Public Debt prepares and distributes tables of redemption values for use in determining the bond's redemption value and the amount of interest earned on the bond.[61] Redemption information is also available from Federal Reserve banks and many other financial institutions.[62] Major Hancock.

Consumer Protection Note

Auto Repairs

Many states have statutes requiring disclosures by automotive repairers before work is begun. Nevertheless, consumers still face problems of unexpected charges for repairs and, in some cases, detention and sale of their cars for nonpayments of disputed bills.

The Ohio Attorney General recently filed suit against a repair company that refused to return a consumer's car after she refused to pay for repairs she did not authorize. The attorney general alleged that the company violated state law by failing to inform the consumer of her right to receive an estimate for repairs over twenty-five dollars, and by failing to provide her with an estimate of repairs that the company expected to exceed ten percent of its original estimate.[63]

In this case, the consumer's nine-year-old car, worth about $500, was leaking oil. She took it to a garage. When it was repaired she paid the thirty-four dollar repair bill, though the garage never had notified her of her right to an estimate or provided her with a correctly itemized receipt. Several days later, the car still was leaking oil. She took it back to the garage, where the repairer told her it needed a rebuilt engine. She had it installed, and paid the shop $919. She was back several days later with more engine trouble; this time the repairer informed her he would not charge her for repairs. Nevertheless, he later billed her thirty-eight dollars for work she had not authorized him to complete. Shortly after she paid this bill, the car broke down again. The repairer repeated his promise that this time he would repair the car free of charge. The owner again left her car in his care, and he eventually fixed it after holding it for four months. When the owner returned to reclaim her car, however, the repairer presented her with a bill for $754. When she could not pay, he refused to return the car.

The Ohio Attorney General seeks a $150,000 civil penalty against the garage, as well as restitution and a payment of $200 for every consumer who paid the repairer more than twenty-five dollars at any time within the past two years.[64]

The scenario described above is not unusual. Many soldiers have faced similar problems with disreputable auto repair companies. Too often, legal assistance attorneys, unfamiliar with local consumer protection laws concerning auto repairs, have failed to provide their clients with the fullest possible measure of assistance. This note highlights the automotive repair consumer protection laws of several states to identify potential forms of protection for legal assistance clients.

Washington's automotive repair law "is a consumer protection statute designed to foster fair dealing and eliminate misunderstandings in a trade replete with frequent instances of unscrupulous conduct .... The act is strictly construed [in favor of the consumer]."[65] The statute requires repairers to provide their customers with an

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[61] *Id.* § 321.12(a) (1990).

[62] The public may purchase redemption tables from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

[63] Ohio Admin. Code § 109:4-3-13 (A)(1)(1978) provides:

> It shall be a deceptive act or practice in connection with a consumer transaction involving the performance of either repairs or any service upon a motor vehicle where the anticipated cost exceeds twenty-five dollars and there has been face to face contact at the supplier's place of business during the hours such repairs or services are offered, between the consumer or his representative and the supplier or his representative, prior to the commencement of the repair or service for a supplier to fail, at the time of the initial face to face contact and prior to the commencement of any repair or service, to provide the consumer with a form which indicates ... the reasonably anticipated completion date and, if requested by the consumer, the anticipated cost of the repair or service. The form shall also ... contain the following disclosure[] ... "You have the right to an estimate if the expected cost of repairs or services will be more than twenty-five dollars ...."

Id.

Additionally, Ohio Admin. Code § 109:4-3-13(C)(3) (1978) provides that a deceptive trade practice occurs if the supplier or repairer fails, when the estimated cost is less than twenty-five dollars and an estimate has not been given to the consumer, to obtain oral or written authorization from the consumer for the anticipated cost of any additional, unforeseen, but necessary repairs or services when the total cost of the repairs or services, if performed, will exceed twenty-five dollars. Ohio Admin. Code § 109:4-3-13(C)(12) (1978) further provides that it shall be a deceptive act or practice for the auto repairer to fail to provide the consumer with an itemized list of repairs performed or services rendered, to include a list of parts used and labor ... and the cost thereof to the consumer.

[64] National Ass'n of Attorneys General, Consumer Protection Report (May-June 1991) at 23-24.

[65] Bill McCurley Chevrolet, Inc. v. Rutz, 808 P.2d 1167, 1169 (Wash. Ct. App. 1991).

estimate whenever the repairer expects the cost of repairs to exceed seventy-five dollars. Any repairer who fails to inform a customer of this right or provide a customer with a required estimate commits an unfair and deceptive trade practice. As punishment, the repairer may be precluded from recovering repair costs or asserting a possessory or chattel lien against the car.[66]

New Jersey is another state that has adopted strict automotive repair laws. In one New Jersey case, the court held that the owner of an auto shop violated the state's consumer fraud act. The owner apparently had failed to comply with a statute requiring him to obtain a written authorization, signed by the owner, for work to be performed on the car and provide the owner a written estimate of the cost of repairs. The court noted that the repairer was reputable and had acted in good faith, but held this to be irrelevant. His technical noncompliance with the statute left him with an unenforceable contract. Moreover, because New Jersey statutes mandate assessment of treble damages for even unwitting noncompliance with state consumer protection laws, the court awarded the owner $7200, as well as costs and attorneys fees, even though the car itself was worth only $400.[67]

In a similar case, the Florida District Court of Appeals applied a state statute governing motor vehicle repairs and liens to hold that an owner, who had been given only an oral estimate for repair costs, was liable only for fifty dollars although he had received $1,490 worth of repair work.[68] The same court also awarded an owner damages when a repair shop seized her vehicle in response to her refusal to pay for repairs she had not authorized.[69]

The statutes described above accurately illustrate the remedies that may be available for soldiers victimized by dishonest auto repairers. Each legal assistance attorney should become familiar with these laws as they exist in his or her own jurisdiction. Major Hostetter.

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[66] Wash. Rev. Code Ann. § 46.71.040 (1982) provides:

> If the price of the automobile repairs is estimated to exceed seventy-five dollars and the repairman chooses to preserve any right to assert a possessory or chattel lien or if the customer requests a written price estimate, the automotive repairman shall, prior to the commencement of supplying any parts or the performance of any labor, provide the customer a written price estimate or the following choice of alternatives: "You are entitled to a written price estimate for the repairs you have authorized. You are also entitled to require the repairman to obtain your oral or written authorization to exceed the written estimate. Your signature or initials will indicate your selection." ... If the price is estimated to be less than seventy-five dollars and, after repairs commence, it is determined that the final price will exceed this amount, the automotive repairman must obtain the oral or written authorization of the customer to exceed a final price of seventy-five dollars. No repairman may charge a customer more than seventy-five dollars for repairs under this subsection unless authorized orally or in writing by the customer. A violation of this act constitutes a violation of the Consumer Protection Act.

Automobile Repair Act, Wash. Rev. Code Ann. § 46.71.070 (1982); *see also* Webb v. Ray, 688 P.2d 534 (Wash. Ct. App. 1984) (holding that when repair shop gave owner no estimate of costs, Automobile Repair Act precluded shop from charging owner for work performed).

[67] Huffmaster v. Robinson, 534 A.2d 435 (N.J. Super. Ct. Law Div. 1986). The owner claimed that he had believed repair costs would be $2000 when he agreed to repairs, but the repairer later said the agreed price was $6000. The owner had prepaid the $2000, but he refused to pay the disputed balance. The repairer would not release the car. In addition, he assessed storage charges against the owner—an initial fee of sixty-five dollars plus ten dollars per day. The court found the repairer reputable and a believable witness, stated that the owner could not reasonably have expected to have such extensive work done for only $2000, and concluded the contract actually had been for $6000. The repairer, however, had failed to give the owner a written estimate of the charges. That this omission had not been in bad faith, the court noted, was irrelevant. A merchant need commit no actual deceit or fraudulent act to violate the Consumer Fraud Act; any a failure to comply with the express requirements of the act will trigger its penalties. In this case, the repairer had no right to any money from the owner and could not charge him a storage fee, nor was the repairer entitled to keep the car by virtue of any lien for repairs.

[68] Osteen v. Morris, 481 So. 2d 1287 (Fla. Dist. Ct. App. 1986). The shop owner initially gave the car owner an oral repair estimate of $500 to $700, but later verbally informed the owner that this estimate had increased to $1,490.90. The owner authorized the repairs. The repairer fixed the car, apparently to the owner's satisfaction. The court found, however, that by failing to provide the consumer with a written estimate, the repairer violated the Florida Motor Vehicle Repair Act. Consequently, the owner of the car was not indebted to the shop.

Fla. Stat. Ann. § 559.905 (1980) provides that when any customer requests a motor vehicle repair shop to perform repair work on a motor vehicle, the cost of which will exceed fifty dollars to the customer, the shop must prepare a written estimate—which is a form setting forth the estimated cost of repair and diagnostic work—before beginning any diagnostic work or repair. Fla. Stat. Ann. § 559.923(1) permits any customer injured by a violation of Motor Vehicle Repair Act, Fla. Stat. Ann. §§ 559.901-559.923 (1980), to bring an action for relief in an appropriate court. The prevailing party in that action may be entitled to damages plus court costs and reasonable attorney's fees. The customer also may seek injunctive relief in the circuit court. The state attorney also may bring an action for an injunction or other appropriate civil relief, including a civil penalty to $500 for each violation, damages for injured customers, court costs, and reasonable attorney's fees.

[69] Gonzalez v. Tremont Body and Towing, Inc., 483 So. 2d 503 (Fla. Dist. Ct. App. 1986).

Claims Report

United States Army Claims Service

Tort Claims Note

Detention of Goods Exception to the Federal Tort Claims Act

Claims personnel often must contend with the claims of persons whose property was seized in the course of Army law enforcement activities. Commonly, these claims are filed by crime victims whose property has been retained as evidence. Recently, claims personnel also have seen an increasing number of claims filed by perpetrators of crimes for property that the Army has refused to return to them. For example, a soldier convicted of distribution of a controlled substance might file a claim to recover the value of evidence seized from him during a search incident to apprehension, assuming no forfeiture statute bars recovery. Whatever the status of the claimant, however, the seizure of private property by military law enforcement officers presents claims personnel with a difficult question—that is, does the detention of goods exception to the Federal Tort Claims Act (FTCA)[1] prevent recovery on a claim when the claim stems from the conduct of law enforcement officers who are not performing customs activities? The claims officer's determination of this issue is crucial to resolving claims filed under the Military Claims Act (MCA)[2] as well as claims filed under the FTCA, because Army Regulation 27-20[3] applies the detention of goods exception to both statutes.[4]

The language of the FTCA does not provide claims officers with a definite answer. The statute creating the exception states, in pertinent part, "[t]he provisions of the FTCA shall not apply to [any] claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." The act's legislative history is similarly unhelpful in resolving the issue.

In *Kosak v. United States*[5] the Supreme Court exhaustively discussed the legislative history of the FTCA before ruling that the detention of goods exception applies to property damaged while in the possession of the Customs Service. Before this decision, courts had held the exception to bar claims only for losses directly resulting from the actual seizure, and not for property lost or damaged through government negligence after it was seized.

The only other Supreme Court decision concerning the detention of goods exception involves the loss of imported goods held by the Customs Service pending the importer's posting of a forfeiture bond. In *Hatzlach Supply Co., Inc. v. United States*[6] the Court held that the exception barred recovery under the FTCA, but added that the exception did not invalidate the importer's alternate claim under the Tucker Act[7].

To date, the Supreme Court has applied the detention of goods exception only to customs activities[8]. Recent lower court decisions, however, have extended the detention of goods exception to bar claims arising from other forms of law enforcement. In *Schlaebitz v. United States*[9] the United States Court of Appeals for the Eleventh Circuit upheld a decision denying recovery to an FTCA claimant for the loss of the claimant's luggage, which agents of the Federal Marshal's Service had released to a third party after seizing it pursuant to the claimant's arrest. The court expressly rejected the theory that the exception protects only customs officers, excise officers, and law enforcement officials who assist in customs duties or tax collection. Rather, the FTCA exempts claims arising from the detention of goods by law enforcement officers of any kind who seize the goods in the performance of their lawful duties.[10] The court noted that every federal circuit that has considered this issue has interpreted the exception in a similar fashion.[11] This

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[1] Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1982).

[2] 10 U.S.C. §§ 2731-2737 (1982).

[3] Army Reg. 27-20, Legal Services: Claims (28 Feb. 1990) [hereinafter AR 27-20].

[4] AR 27-20, para. 3-4*k*.

[5] 465 U.S. 848 (1985).

[6] 444 U.S. 460 (1980).

[7] *See* 28 U.S.C. §§ 1346(a)(2), 1491 (1982).

[8] In *Kosak* the Court expressly refused to decide what types of officers, other than customs agents, are covered by the detention of goods exception. *See Kosak*, 104 S. Ct. at 1522 n.6.

[9] 924 F.2d 193 (11th Cir. 1991).

[10] *Id.* at 194.

[11] *Id.*; *see, e.g.*, Ysasi v. Rivkind, 856 F.2d 1520 (Fed. Cir. 1988) (exception protected border patrol agents' seizure of a truck used to bring illegal aliens into the United States); United States v. 2116 Cases of Boned Beef, 726 F.2d 1481 (10th Cir. 1984) (exception applied to seizure of adulterated beef by the Department of Agriculture); Formula One Motors, Ltd. v. United States, 777 F.2d 822 (2d Cir. 1985) (exception barred recovery for loss of automobile dismantled and virtually destroyed in search by agents of the Federal Bureau of Investigation); *accord* United States v. Lockheed L-188 Aircraft, 656 F.2d 390 (9th Cir. 1979) (seizure of aircraft by Federal Aviation Administration for violation of federal air safety regulations); United States v. 1500 Cases, More or Less, 249 F.2d 382 (7th Cir. 1957) (seizure of adulterated tomato paste).

interpretation, the court remarked, "comports well with both the *Kosak* opinion and the purpose of the statute."[12]

Claims attorneys may infer from the prevailing trend in the federal circuit courts that the detention of goods exception applies to any seizure, damage, or disposition of evidence pursuant to any manner of military law enforcement activity, provided that the law enforcement agents involved have complied with the fourth amendment requirements of probable cause and, when applicable, issuance of valid warrants.

If evidence has been seized validly, claims personnel must determine whether it has been properly disposed of to decide whether a claim is payable. Unlike many other federal agencies, the Army has no statutory guidance for disposition of evidence seized in the course of law enforcement activities. Claims attorneys must look instead to applicable regulations. Army Regulations 190-22[13] and 195-5[14] list rigid criteria for disposing of contraband; firearms; ammunition; counterfeit currency and equipment; drugs; and prohibited property. These regulations, however, set forth no procedures to preserve due process. Rather, they appear to leave this task to the discretion of the staff judge advocate (SJA) concerned. The SJA must assign the different types of evidence to the disposal categories enumerated in the regulations, determine whether the property should be confiscated, and—in the absence of a controlling judicial determination—decide to whom property should be returned.[15] An SJA involved in making these decisions must adopt some system to protect due process. For guidance see *Sterling v. United States*[16] and *Locks v. Three Unidentified Custom Service Agents.*[17] Moreover, the SJA should document his or her rationale each time he or she approves plans to keep or destroy seized property that no longer is needed as evidence, or to deliver this property to any person other than the party from whom it was seized.

The absence of statutory directives for the disposition of seized property has caused the Army no major problems—probably because the property involved usually is of little value. Remarkably few claims for property seized by the Army have reached USARCS, and none of the reported cases involve Army law enforcement activities.[18]

A final note of caution is appropriate. Application of the detention of goods exception will not necessarily preclude recovery on the claim. The claim may have multiple potential remedies. As the Supreme Court noted in *Hatzlach*, the proper denial of an FTCA claim based upon the detention of goods exception will not rule out a claim under the Tucker Act. Similarly, the application of the exception will not preclude a claim cognizable under other administrative claims statutes that apply to the military, such as the Personnel Claims Act[19] (PCA) and the Foreign Claims Act[20] (FCA), particularly if the Army seized the property in violation of the fourth amendment, or if the Army's retention of the property amounts to an uncompensated taking in violation of the fifth amendment.[21]

In summary, claims personnel may apply the detention of goods exception to deny tort claims for evidence properly seized during law enforcement activities if, after seizing the property, law enforcement personnel gave due regard to its proper care, safeguarding, and eventual disposition. If evidence improperly was seized, cared for, safeguarded, or disposed of, then the claim may be payable. Consult the Tort Claims Division, USARCS, for guidance if in doubt. Mr. Rouse.

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[12] *Schlaebitz*, 924 F.2d at 194-95.

[13] Army Reg. 190-22, Searches, Seizures, and Disposition of Property (1 Jan. 1983) [hereinafter AR 190-22].

[14] Army Reg. 195-5, Evidence Procedures (15 Oct. 1981) [hereinafter AR 195-5].

[15] While Army Regulation 190-22 states that the Army has no authority to adjudicate disputes, it permits the SJA to advise evidence custodians on what constitutes conclusive proof of ownership in the absence of a conclusive judicial determination. *See* AR 190-22, para. 3-4*a*(4).

[16] 749 F. Supp. 1202 (E.D.N.Y. 1990).

[17] 759 F. Supp. 1131 (E.D. Pa. 1990).

[18] Two cases that reached the federal courts are typical of the few claims USARCS has received. In *Price v. United States*, 707 F. Supp. 1465 (S.D. Tex. 1989), the claimant compelled the Army to return Adolf Hitler's watercolors and photo archives, which were seized by American soldiers in 1945, to the Federal Republic of Germany. In *Morrison v. United States*, 316 F. Supp. 78 (M.D. Ga. 1970), the court permitted the Army to retain $100,000 found in a cave in Vietnam by a soldier who turned it over to his commander. The court held that the soldier's claim was barred by the foreign country exception to the FTCA. *See* 28 U.S.C. § 2680(k) (1982).

[19] 31 U.S.C. §§ 3721-3731 (1982). Army Regulation 27-20 provides that, if the claimant is a proper party under the Personnel Claims Act, deprivation of property held as evidence will provide sufficient basis for a cognizable claim if the temporary loss of the property will work a grave hardship on the claimant. AR 27-20, para. 11-4*g*. Department of the Army Pamphlet 27-162 implies that the AR 27-20 contemplates the application of the PCA to the victim of a crime, but not to a criminal accused, whose claim usually would not be payable unless the Army disposed of his or her property wrongfully or improperly. *See* Dep't of Army, Pam. 27-162, Claims, para. 2-32 (15 Dec. 1989) [hereinafter DA Pam. 27-162].

[20] 10 U.S.C. §§ 2734-2734b (1982). The Foreign Claims Act may apply if the seizure occurs outside the United States and the claimant is a person normally a resident of a foreign country. 10 U.S.C. § 2734(a) (1982); *see also* DA Pam. 27-162, § III, chap. 4.

[21] The law is unsettled on whether the detention of goods exception is applicable to the MCA when the the government's seizure of private property violates the fourth or fifth amendment because a seizure of that nature creates a bailment in the government. Each case must be determined on its own facts. Claims personnel should consult the Torts Division, USARCS, for guidance when considering these claims.

Personnel Claims Note

Collection of Debts and Overpayments from Claimants Using IRS Tax Offset Procedures

Paragraph 11-13f of Army Regulation 27-20 authorizes claims personnel to recalculate the amount allowed on any personnel claim and requires field claims offices to recoup overpayments from any claimant who misrepresents, fraudulently or otherwise, the facts necessary to the adjudication of the claim. The collection of overpayments often presents a claims office with difficult problems. Fortunately, claims personnel can adopt several procedures to assist in recoupment.

Voluntary Repayment

Voluntary repayment is the Army's preferred method of collecting excess payments. Upon determining that a claimant has been overcompensated, the field office should contact the claimant, orally or in writing, to notify him or her of the overpayment and to request that he or she repay the government voluntarily. The office should advise the claimant that if he or she refuses to return the overpayment, the government can offset this sum against either the claimant's military or civil service pay or against his or her federal income tax refund. If the claimant agrees to repay the government, the field office may consider any reasonable arrangements for making full restitution the claimant may propose. Claims personnel, however, must use sound discretion in arriving at a repayment schedule.

Involuntary Collection From Civilian or Military Pay

If the claimant refuses to return the overpayment, the field office must determine the proper basis to obtain involuntary recovery from the claimant. Debts may be deducted from a soldier's pay as an administrative offset under title 37, United States Code, section 1007, while the salary of a civilian employee of the Army should be offset under title 5, United States Code, section 5514, and title 37, United States Code, section 3716. If the claimant is a retired civil service employee, the Claims Collection Standards, 4 C.F.R. section 102.4 (1986), authorize an administrative offset of the retiree's civil service retirement pay. Moreover, all claimants who receive funds from the government, regardless of employment status, are further vulnerable to involuntary collection. Specifically, by signing the DD Form 1842, each claimant has expressly authorized the government to withhold his or her pay for any overcompensation which the claimant may receive because of subrogated payments by insurers, carriers or any other persons, or because of any information that the claimant has provided to the government that the government later discovers to be untrue.

If the claimant is an active duty soldier or civilian employee, claims personnel should complete a Pay Adjustments Authorization, DD Form 139, and forward it to the finance and accounting office that services the claimant. The DD Form 139 should state the factual and legal basis and the authority for the collection action. Involuntary collection from retirees is handled in a similar fashion. If the claimant is receiving military retirement pay, the field offices should complete and send the DD Form 139 to Retired Pay Operations, Department 90, Defense Finance Accounting Service, Indianapolis, Indiana 46249 [hereinafter DFAS]. If the claimant is a retired civil service employee, the claims personnel should send a completed DD Form 139 or letter of indebtedness to the finance office at the employee's last place of government employment. The finance office will forward the DD Form 139 or letter of indebtedness to the agency responsible for disbursement of the claimant's civil service retirement pay.

After the completion of recoupment action by any of the above methods, DFAS, the Office of Personnel Management, or the local finance and accounting office will send the field office the amount recovered, in the form of one or more checks, as well as written verification that recoupment action has been completed. The field office must place all documentation verifying initiation and completion of recoupment action in the claim file and deposit the check into the field office claims account. Claims personnel should record amounts collected into the Revised Personnel Claims Management Program as "Non-GBL Recovery" and enter "refund from claimant" in the "Contractor" field.

Internal Revenue Service Tax Refund Offset

If the collection by the above methods proves unsuccessful because the claimant does not receive regular income from the government salary from which his or her debt may be offset, the field office again vigorously must pursue voluntary collection from the claimant. In many cases, however, a claimant who has left active duty or who is no longer a government employee will refuse to repay the debt voluntarily or else cannot be located. Title 31, United States Code, section 3720A, authorizes the government to collect debts from these claimants by withholding the amount of each claimant's debt from his or her federal income tax refund.

The United States Army Claims Service is a participant in the Federal Income Tax Refund Offset Program. The DFAS at Fort Benjamin Harrison serves as the Army's liaison to this program and will act as a coordination point for field claims offices. DFAS also provides USARCS and field offices access to the IRS locator service, helping USARCS and field offices obtain the most recent tax address of a debtor when other attempts to locate the debtor have been unsuccessful. To take advantage of the Taxpayer Address Request Program, USARCS must request the address through DFAS. Field offices must notify USARCS prior to June 1st of each

year of any debtors for whom they wish to request addresses. USARCS will respond back to the requesting field office when it receives the list of current tax addresses from DFAS in September.

The Federal Income Tax Refund Offset Program allows USARCS to ask the IRS to offset a claimant's income tax refunds to collect an overpayment. USARCS may recover a delinquent debt under the program, if the debt exceeds twenty-five dollars in value, cannot be collected by salary offset, is between ninety days and ten years past due, and is valid and legally enforceable.

An agency seeking collection under the offset program must inform the debtor by certified mail of the obligation to repay the debt, the agency's intention to pursue income tax refund offset, and the debtor's legal rights regarding the collection action. The agency must send this notice no less than sixty days, and no more than one year, before the agency applies to the IRS for income tax refund offset. Accordingly, in claims recoupment actions, a field office must send the debtor notice in the form of a certified letter at least sixty days prior to USARCS's application to DFAS for income tax refund offset. USARCS will provide samples of the certified letter on request. Although the exact day has not yet been set, USARCS's annual deadline for applying to DFAS for income tax refund offset falls in December of each year. Consequently, the field claims office must send the certified letter to the debtor by October 1st to offset the debtor's income tax refund for the following year.

In the offset application, USARCS must certify that the statutory notice requirements have been met and indicate the amount of the debt to be set off. The field claims office must provide USARCS by November 15th of each year with the identity of all debtors against whom income tax refund offset should be initiated. Tax offset requests by field offices must include the name and social security number of the debtor, the amount of the debt, and the circumstances justifying collection of the debt by tax offset, including a description of previous collection efforts.

The Internal Revenue Service will withhold 1991 income tax refund offsets from the debtor's 1992 income tax returns. If the full amount cannot be collected from the debtor's 1992 refund, the offset action will roll over into the next tax year, and continue to roll over until the debt is satisfied.

Once the IRS has taken offset action, DFAS will send USARCS verification of recoupment, as well as a check for the money collected. USARCS, in turn, will deposit the check and forward notification of collection to the field offices, to include it in the debtor's claim file. The field office then will close the claim and forward it for retirement.

Any questions concerning the program should be directed to the Personnel Claims and Recovery Division at USARCS (DSN 923-3226 or commercial 301-677-3226). Captain Ward.

Personnel Claims Recovery Note

Calculating Carrier Liability on Unaccompanied Baggage Shipments

To calculate carrier liability on direct procurement method (DPM) shipments and government bill of lading (GBL) unaccompanied baggage shipments (code 7,8, and J shipments), claims offices must determine whether the carrier prepared the inventory as a "proper" household goods shipment inventory. *See* DA Pam. 27-162, para. 3-11 (15 Dec. 1989); *see also* Dep't of Defense Directive 4500.34R, Department of Defense Property Shipment and Storage Program, appendix A, tender of service, para. 54 (10 Apr. 1986) [hereinafter DOD Dir. 4500.34R]. If the carrier prepared the *entire* inventory rather than just a portion as a "proper" inventory, the carrier's maximum liability is sixty cents times the weight for each individual item or carton, as established in the Joint Military-Industry Table of Weights. Otherwise, claims offices should use "container weight" rules to determine the extent of carrier liability.

"Proper" Inventories

To prepare a "proper" inventory, the carrier must list and describe each item or carton and its contents on a separate inventory line, noting any pre-existing damage to each item. The carrier may *not* skip inventory lines. A "proper" inventory must list cartons by their size in cubic foot capacity, such as "3 cu. ctn.," or by the types of cartons, such as "dishpack" or "mirror carton." Standard cartons normally vary in capacity from 1.5 cubic feet, with exterior dimensions measuring 16⅞" × 12⅝" × 12⅝" in size, to 6.1 cubic feet, with exterior dimensions measuring 24" × 18" × 24". A "proper" inventory also must include a general description of the contents of each carton. *See* DA Pam. 27-162, para. 2-11b; *see also* DOD Dir. 4500.34R, appendix A.

If the carrier lists a number of items on a single line of an inventory, fails to list carton sizes or types, or lumps items like clothing together in "bundles," the inventory is not a "proper" inventory. Moreover, an inventory is not a "proper" inventory if it merely lists items and their approximate cubic "sizes" on separate inventory lines. For example, "1.0 cu.—clothing," indicates that the carrier has failed to pack items in small cartons before placing them inside larger containers for shipping. Claims personnel also may assume that the carrier failed to pack individual items properly if the inventory shows cubic sizes for a number of carton-packed items that do not correspond to standard carton sizes, or if the inventory states that an item was packed in a carton that could not possibly hold that item, such as a nineteen-inch television allegedly "packed" in a three-cubic-foot carton.

Several illustrations demonstrating the difference between "proper" and "improper" inventories appear in DA Pam. 27-162. Figure 3-4 shows an example of a

"proper" inventory. Figure 3-5 displays an inventory that is prepared only partially as a "proper" inventory. This inventory is not completely "proper," even though it shows that most of the items are packed in appropriate cartons—because the "towels and linens" on line 4, the "shoes and boots" on line 6, and the "video tapes" on line 10 are not shown as being packed in cartons as they are required to be. Figure 3-7 provides a clear example of an inventory that is not prepared as a "proper" inventory at all.

"Container Weight" Rules

If the carrier did not prepare the *entire* inventory as a "proper" household goods shipment inventory, claims offices must use "container weight" rules to determine the carrier's liability. This means that, on code 7, 8 and J shipments, the carrier's maximum liability is sixty cents times the gross weight of the "container"; that is, the large shipping box in which individual items and small cartons are packed. The gross weight is the net weight of the container's contents plus the "tare" weight, which is the weight of the packing material used. For DPM shipments, on the other hand, "container weight" liability must be based on the *net* weight of each container, rather than the gross weight. Apart from this, however, DPM liability for the origin and destination contractors is figured in the same manner as code 7, 8 and J liability.

To apply "container weight" rules, the claims office must examine the file to find the actual weight and cubic-foot size for each container and for the entire shipment. The inventory normally will list the cubic-foot size of each container; occasionally it also will list either the weight of each container or the gross or net weight of the shipment at the bottom of the form. In addition, the weight of the shipment frequently appears in Block 4 of Section A on the DD Form 1840. Although this block is entitled "net weight," carriers often enter the gross weight of code 7, 8 and J unaccompanied baggage shipments there. The "Reweigh Certification" block or the "Remarks" block on the DD Form 619-1 also may list gross weight of the code 7, 8, and J shipments.

If the documents in the claims file do not list the shipment weight, contact the installation transportation office (ITO) at the origin or at the destination of the shipment. The origin ITO usually can provide a completely annotated copy of the GBL, while the destination ITO usually has a copy of the actual weight ticket.

If neither ITO can provide the shipment weight of a code 7, 8, or J shipment, the claims office should use DD Form 870 (*see* DA Pam. 27-162, fig. 3-3) to request a copy of the complete GBL file from DFAS. This GBL file will contain a copy of the government bill of lading. It will be annotated with the gross, tare, and net weight of the shipment; the number of cubic feet shipped; and the number of containers. It also should contain a copy of the actual weight ticket and a copy of the DD Form 619-1 if the shipment was reweighed. Address requests for GBL files to Transportation Operations, Defense Finance and Accounting Service, ATTN: DFAS-I-TGC, Indianapolis Center, Indianapolis, IN 46249-0631.

If the documents list the actual gross weight—or net weight for DPM shipments—of each container, simply multiply this weight by sixty cents per pound to determine the maximum liability for items in that container. Often, however, the documents in the claims file will not reflect the actual weight of each container. When the actual weight of each container is not available, claims personnel may rely instead on various other formulae to compute carrier liability—though the claims office must recompute the carrier's liability if the carrier later furnishes a weight ticket showing the actual gross weight of each container. Each claims office should seek to apply these methods *in the order in which they are set forth below.*

(1) If the documents list the weight of the shipment and the cubic displacement of EACH container, claims personnel should add the cubic feet of the containers together to determine the total cubic feet in the shipment, then divide the gross weight of the shipment by the total cubic feet in the shipment to get an average weight per cubic foot. They then should multiply this average weight by the number of cubic feet in the container in which the damaged or missing item was packed to establish the weight of that container. Finally, they should multiply the weight of the container by sixty cents per pound to get maximum liability for that container.

(2) If the documents list the weight of the shipment and the number of containers shipped, but do not show the cubic capacity of each container, claims personnel should consider all the containers to be equal in weight. They then should divide the weight of the shipment by the number of containers shipped to get the average weight of each container, and multiply the average weight by sixty cents per pound to establish the extent of the carrier's liability for each container the carrier lost or damaged.

(3) If the documents list the weight of the shipment, but the inventory does not indicate how many separate containers were shipped, claims personnel should consider the shipment to be one large container, multiplying the weight of the shipment by sixty cents per pound, using this as the carrier's maximum liability on the claim.

(4) Finally, if the documents list the cubic capacity of each container, but claims personnel *cannot* determine the weight of the shipment, they should assume that each container has a constructive weight of eleven pounds-per-cubic-foot. Accordingly, they should multiply the cubic-foot size of

each container by eleven pounds, then multiply this constructive weight times sixty cents-per-pound to get the maximum liability of that container. In everyday practice, claims personnel rarely need to resort to this formula. Because carriers bill the government based on the weight of the shipment, the ITO or DFAS can provide the shipment weight in nearly every instance.

Refer questions concerning unaccompanied baggage liability to the Recovery Branch, United States Army Claims Service. Mr. Frezza

Management Notes

Closure of a Claims Processing Office

On 16 May 1991, the Neu Ulm Claims Office (E61), 1st Infantry Division (Forward), ceased its claims operations. Accordingly, USARCS terminated the authority for Neu Ulm to act as a claims processing office, effective 17 May 1991. Although the office will continue to provide other legal services to the Neu Ulm community, it no longer will accept or process claims. Claimants now should file their claims at Goeppingen. Lieutenant Colonel Thomson

Designation of Claims Attorneys

Paragraph 1-6*d* of Army Regulation 27-20 restricts the authority to designate individuals other than judge advocates to serve as claims attorney to the Commander, USARCS. Field claims offices seeking the designation of qualified civilian attorneys as claims attorneys must send a designation request to the commander. The request must include a justification for the designation, a statement of qualifications, a statement of current duties, and the monetary authority desired. The statement of qualifications must be more than a blanket assertion that the individual is qualified to be a claims attorney. It must set out the individual's educational background, prior work experience, and any other significant matters that qualify him or her for the position. Failure to provide this information will delay the commander's decision. Lieutenant Colonel Thomson.

Model Claims Office Reports

Army claims offices included in the Model Claims Office Program are reminded that fiscal year 1991 reports are due at USARCS, or the command claims services in Europe and Korea, by 15 November 1991. *See* Note, *The Model Claims Office Program*, *The Army Lawyer*, August 1990, at 43, for guidance on completing the report form previously provided. Any office needing another copy of the report form (which can be reproduced locally) should contact Ms. Nancy Brillant, DSN: 923-7622/7960; Commercial: (301) 677-2051/4469). Colonel Fowler.

Environmental Law Note

OTJAG Environmental Law Division
TJAGSA Administrative Civil Law Division

Waiver of Sovereign Immunity Under RCRA: Evolving Controversy

Sovereign Immunity and RCRA

The doctrine of sovereign immunity, which derives from English common law, suggests the superiority and infallibility of the crown. American statutes and caselaw have upheld this ancient doctrine to the present day, shielding the federal government from legal attack. Congress may make specific exceptions to federal sovereign immunity, but the federal courts will not allow Congress to surrender the government's protection lightly. For these exceptions to be effective, the intention of Congress to waive sovereign immunity must be "clear, concise, and unequivocal."[1] Moreover, even if the waiver is effective, its terms will be "strictly construed in favor of the sovereign."[2] The federal government may be sued or penalized, but only if Congress has stated in plain and unambiguous language that, with regard to some particular statute, federal sovereign immunity has been waived.

In 1976, Congress enacted the Resource, Conservation and Recovery Act[3] (RCRA), intending to provide a "cradle-to-grave" regulation of all solid and hazardous waste. The RCRA subjects federal facilities, including Army installations, to all "Federal, State, interstate and local hazardous or solid waste requirements, both sub-

[1]Army and Air Force Exch. Sys. v. Sheehan, 456 U.S. 728, 734 (1982); Hancock v. Train, 426 U.S. 167 (1976).

[2]Ruckelshaus v. Sierra Club, 463 U.S. 680, 683-85 (1983); United States v. King, 395 U.S. 1, 4 (1969); McMahon v. United States, 342 U.S. 25, 27 (1951).

[3]42 U.S.C. §§ 6901-6987 (1982).

stantive or procedural."[4] Since the RCRA's enactment, state governments have argued that the act not only compels federal agencies to follow the states' permit and reporting requirements, but also permits state governments to fine federal agencies for noncompliance with state pollution laws. The Department of Defense (DOD) and the Department of Energy (DOE), however, have refused to pay state fines, averring that penalties imposed by states and localities under their respective hazardous waste laws are not substantive or procedural "requirements" as envisaged by the act.

To date, federal courts have refused to find a clear and unambiguous waiver of federal sovereign immunity in the language of the RCRA.[5] State and local governments have objected bitterly, claiming that the courts' decisions have left them powerless to protect their constituents from health risks caused by uncorrected hazardous waste violations on federal property.

Pending Legislation

States and environmentalists have lobbied Congress to amend the RCRA to limit the federal government to the same amount of protection that it presently enjoys under two other environmental statues. The Clean Air Act[6] (CAA) and the Clean Water Act[7] (CWA) both contain provisions governing the application of state law to federal facilities that are virtually identical to the provisions appearing in the RCRA.[8] Both the CAA and the CWA presumably waive the federal government's immunity to the imposition of state civil penalties—Congress amended the CAA in 1977 expressly to add language waiving federal immunity to state penalties,[9] and the Sixth and Tenth Circuit Courts of Appeals recently ruled that Congress also waived immunity to state penalties for violations of the CWA.[10]

The exertions of state lobbyists have triggered a response in Congress. Two bills presently under consideration in the House and the Senate would amend the RCRA to waive federal sovereign immunity for state penalties. On May 15, 1991, the Senate's Environment and Public Works committee unanimously approved Senate Bill 596,[11] proposed by Senator George J. Mitchell, which would authorize states to fine federal facilities for environmental violations of state hazardous waste laws. In the House of Representatives, the Energy and Commerce Committee is expected to approve Congressman Dennis E. Eckart's House Bill 2194,[12] which contains a waiver of immunity substantially similar to the one appearing in the Senate bill.

In the past, similar legislation failed to pass both houses, usually dying in committee because of strong opposition from the executive branch. The present legislation, however, has attracted no substantial opposition. On May 29, 1991, the Department of Defense, the Department of Energy, and the Environmental Protection Agency (EPA) sent a joint proposal to the Chairman of the Senate Environment and Public Works Committee, in which they actually agreed, somewhat unexpectedly, to support the Mitchell bill.

The joint submission does not express unreserved approval for Senate Bill 596. It contains eleven proposed amendments to the bill, several of which would change the bill significantly. For example, the second amendment, addressing "the current lack of ... technology for treating radioactive mixed waste prior to disposal," would allow the Department of Energy (DOE) "adequate time" for the development of increased treatment capacity and new treatment technologies. Upon developing adequate technology, the DOE would draft its own national compliance plan, subject only to review and approval of the Environmental Protection Agency (EPA). Before the EPA approves the plan, the DOE would be immune to state penalties for improper treatment and storage of mixed radioactive waste; thereafter, the DOE would be financially liable only for conduct that violates the plan. The third amendment contains an equally significant reservation, exempting "military-essential activities," including "munitions and ordnance activities when such is essential to the paramount interest of [the United States]," from state regulation and punishment under the RCRA.

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[4] *See id.* § 6961.

[5] So far, the Sixth, Ninth and Tenth Circuits, along with five district courts, have found that RCRA does not waive federal immunity to civil penalties under state law. *See* Ohio v. Department of Energy, 904 F.2d 1058, 1062-64 (6th Cir. 1990), *rev'g in part, aff'g in part* on other grounds, 689 F. Supp. 760, 764 (S.D. Ohio 1988); Mitzelfelt v. Department of Air Force, 903 F.2d 1293 (10th Cir. 1990), *aff'g* No. 88-1535-M civil (D. N.M. July 14, 1989) (unpub. order); United States v. Washington, 872 F.2d 874 (9th Cir. 1989), *aff'g* 18 Envtl. L. Rep. (Envtl. L. Inst.) 20,363 (E.D. Wash. 1988); California v. Department of Defense, 18 Envtl. L. Rep. (Envtl. L. Inst.) 21,023 (E.D. Cal. 1988), *aff'd*, No. 88-2912 (9th Cir. June 26, 1989) (unpub. order); Meyer v. United States Coast Guard, 644 F. Supp. 221 (E.D.N.C. 1986); McClellan Ecological Seepage Situation v. Weinberger, 655 F. Supp. 601 (E.D. Cal. 1986); *see also* California v. Walters, 751 F. 2d 977 (9th Cir. 1984) (per curiam) (RCRA does not waive sovereign immunity from state-imposed criminal penalties).

[6] 42 U.S.C. §§ 7401-7642 (1982).

[7] Clean Water Act of 1977, Pub. L. No. 95-217, § 1, 91 Stat. 1566 (codified as amended in scattered sections of the Federal Water Pollution Act, 33 U.S.C §§ 1251-1376 (1982)).

[8] *See* 42 U.S.C. § 7418(a) (1982); 33 U.S.C. § 1323(a) (1982).

[9] *See* Clean Air Act Amendment of 1977, Pub. L. 95-95 § 116(a), 91 Stat. 685, 711.

[10] Ohio v. Department of Energy, 904 F. 2d 1058 (6th Cir. 1990); Sierra Club v. Lujan, No. 90-1183 (10th Cir. Apr. 30, 1991).

[11] S. 596, 102d Cong., 1st Sess. (1991).

[12] H.R. 2194, 102d Cong., 1st Sess. (1991).

The other proposed amendments would change the Mitchell bill in the following ways: (1) the first amendment would excuse DOE actions where compliance with RCRA requirements would result in radioactive exposure to employees above Atomic Energy Act standards; (2) the fourth amendment would reclassify waste aboard certain federally owned ships to exclude it from the Solid Waste Disposal Act; (3) the fifth would reclassify refuse generated by industrial, domestic, and sanitary sources as "solid" rather than "hazardous" waste; (4) the sixth would resolve ambiguities over which state administrative fees are acceptable "fees" and which are unacceptable "taxes"; (5) the seventh would shield federal employees from personal liability for civil sanctions more properly sought against the federal government: (6) the eighth would delete a section of Senate Bill 596 that would require federal facilities to perform assessments of releases of solid wastes that already are required by RCRA; (7) the ninth would eliminate a section of the bill requiring federal agencies to reimburse the EPA for inspections of their facilities; (8) the tenth would require states to use funds collected as fines and penalties solely for the promotion and maintenance of state environmental programs; and (9) the final amendment would adopt language from the Atomic Energy Act to define "radioactive mixed waste." Senator Mitchell has agreed to consider these reservations as possible amendments to his bill before submitting the bill for a full Senate vote.

The joint agency proposal shifts the focus of controversy from the bill itself to the more subtle, complicated issues raised by the proposed amendments. Environmentalists and state interest groups argue that the joint agency proposal essentially guts the bill, while purporting to support it for public image's sake. They point out, for example, that the amendment allowing the Department of Energy to draft its own hazardous waste scheme would absolve DOE from penalty for doing anything not prohibited by its own, potentially narrow, plan. This amendment, state interest groups argue, would deprive the states of the regulatory authority that Congress intended the RCRA to convey.

Senator Mitchell may be a closer ally of the government agencies than many environmentalists now realize. During the Senate Environment and Public Works committee markup, he declared, "This legislation does not deal with the quality or quantity of the standards [but] with [the] enforcement of those standards .... Congress [can] deal with the problem [of states imposing excessively restrictive cleanup standards on federal facilities] at the time it [arises]. That problem is abstract, whereas the [compliance] problem is real." The senator's statement implies that, to empower the states to enforce their environmental schemes, he may be willing to reduce the severity of the standards to which the states may hold the federal government.

Conclusion

Federal agencies finally appear willing to support an amendment to the RCRA that clearly and unequivocally waives sovereign immunity to state and EPA environmental penalties. This apparent willingness to compromise, however, merely may raise the conflict between state and federal interests to a more esoteric plane. The relevant question may no longer be whether Congress should permit the states to penalize federal agencies for hazardous waste violations, but under what circumstances—and to what extent—the states should be permitted to do so. Mr. Anders.

Criminal Law Notes

OTJAG Criminal Law Division

Supreme Court—1990 Term, Part VI

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Hernandez v. New York: New Guidance on Peremptory Challenges

In *Batson v. Kentucky*[1] the Court condemned the prosecutor's discriminatory use of peremptory challenges against members of the accused's racial group. *Batson* established a procedure by which an accused could protest an allegedly discriminatory challenge. This procedure provides that once an accused has established a prima facie case of purposeful discrimination, the prosecutor must set forth neutral reasons for the challenged peremptories.[2] This term, in *Hernandez v. New York*,[3] the Court assessed a prosecutor's alleged use of peremptory

[1] 476 U.S. 79 (1986). *See generally* F. Gilligan and F. Lederer, Courts-Martial Procedure § 15-55.30 (1991).

[2] *Batson*, 476 U.S. at 96-98.

[3] 111 S. Ct. 1859 (1991).

challenges improperly to exclude Hispanic-Americans from the jury. Although the Court affirmed the defendant's conviction in this particular case, the justices were unable to generate a majority opinion. Even so, the separate opinions offer guidance to counsel and trial judges on the *Batson* inquiry procedure.

Defense counsel raised a *Batson* objection to the prosecutor's challenge of Hispanics in the venire. Without waiting for the judge to rule on whether the defense had established a prima facie case of purposeful discrimination, the prosecutor offered his reason for the challenges. The prosecutor explained that, based upon the demeanors and responses of the challenged individuals, he had reservations about whether they would follow an official interpreter or would rely on their own knowledge of the Spanish language as the witnesses testified. The prosecutor further pointed out that all persons involved in the trial were Hispanic and he would have no reason to exclude Hispanic jurors. The trial judge rejected the defendant's claim.[4]

Justice Kennedy authored a plurality opinion, in which he was joined by the Chief Justice and Justices White and Souter.[5] Justice O'Connor wrote an opinion concurring in the judgment and was joined by Justice Scalia.[6] Justice Stevens, dissenting, was joined by Justice Marshall[7], and was joined in part by Justice Blackmun.[8] For purposes of clarity, this note will discuss these opinions in terms of the three steps of a *Batson* inquiry identified by Justice Kennedy: (1) the defendant's prima facie showing of intentional discrimination; (2) the prosecutor's presentation of "race neutral" reasons for the peremptory challenge; and (3) the trial court's determination whether the defendant has proved purposeful discrimination by the prosecution.[9]

Batson first requires that the objecting defendant make a prima facie showing of purposeful discrimination.[10] *Batson*, however, provides no affirmative guidance on what quality or quantity of evidence the defense must proffer to make that showing. *Hernandez*, unfortunately, adds little if any new guidance on this issue. Noting that the prosecutor voluntarily set forth his reasons for the challenges, Justice Kennedy found that the issue of whether Hernandez made a prima facie showing is moot.[11] Justice O'Connor's opinion was simply silent on this issue. Justice Stevens concluded that no dispute existed over the adequacy of the showing.[12] The ultimate significance of this conclusion becomes important to an analysis of Justice Stevens' argument. The immediate significance of his conclusion, however, is that it failed to describe the type of showing a defendant must make to establish a prima facie case of purposeful discrimination.

To take Justice Stevens' apparent position, a defendant meets his or her burden of going forward when the prosecution excludes members of the defendant's racial group from the jury by use of a peremptory challenge, and the defense makes a timely objection. Arguably, if the prosecutor does not challenge all the members of the accused's ethnic group, then the defense must show something more to establish a prima facie showing of discriminatory intent. Exactly what this might be remains unclear. Because purposefulness and intent are subjective, however, a defendant seems constrained to rely on inferences raised by objective indicators—for example, the percentage or number of venirepersons the prosecutor has challenged that are of the accused's ethnicity. In turn, trial judges may be very liberal in determining that an accused has met his initial burden. Because purposefulness is hard to prove, and because the judicial system has no place for discriminatory practices, prosecutors should be prepared to offer neutral reasons in support of any peremptory challenge directed against a member of the accused's racial group.

What can the prosecution offer as a neutral reason in response to the defense's prima facie showing of purposeful discrimination? Justice Kennedy stated that a neutral reason is simply a basis for exclusion other than the race or ethnicity of the juror.[13] This inquiry, according to Justice Kennedy, must determine only whether the reason the prosecutor proffers is "facially valid."[14]

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[4] *Id.* at 1864-65.

[5] *Id.* at 1864-73.

[6] *Id.* at 1873-75.

[7] *Id.* at 1875-77.

[8] *Id.* at 1875.

[9] *Id.* at 1865-66.

[10] *Batson*, 476 U.S. at 96-97.

[11] *Hernandez*, 111 S. Ct. at 1866.

[12] *Id.* at 1877.

[13] *Id.* at 1866.

[14] *Id.*

Unless discriminatory intent is inherent in the prosecutor's explanation, the reason he or she offers will be racially neutral.[15] Though a proffered reason may have a discriminatory impact, it still will deemed race-neutral, unless the prosecutor manifestly intended that impact.[16] Justice Kennedy concluded that, in the instant case, the prosecutor's concern for the jurors' ability or willingness to follow the translation was a neutral reason to exclude the jurors, and was even akin to a proper basis for a challenge for cause.[17]

Justice O'Connor agreed with Justice Kennedy that a neutral reason for exclusion is one other than race, and that disproportionate impact does not undermine the validity of the proffered reason, absent discriminatory intent.[18] The key to determining the legitimacy of the reason is to determine whether it is based on race. So long as the prosecutor's intent is racially neutral, he or she should be free to exercise peremptory strikes "for any reason, or for no reason at all."[19]

The opinions of Justices Kennedy and O'Connor both conclude that the prosecutor's concern over a bilingual juror's apparent hesitancy to accept an official translation is a nonracial basis for exclusion. The prosecution therefore may use a peremptory challenge against a juror under these circumstances. Absent the juror's hesitancy to accept official translations, however, the simple fact that the juror is bilingual—particularly when that ability relates to ethnic background—would not provide sufficient justification to exclude the juror, and the prosecutor's use of a peremptory would appear to reveal discriminatory purposes.

Hernandez does not address the issue of a juror's fluency in English, when a foreign language is the juror's primary language and the juror is, to some extent, unable to understand English. The opinions by Justices Kennedy and O'Connor imply, however, that if a prosecutor were to argue that the juror's lack of proficiency in English impacts upon his or her qualifications to participate in the proceedings, a majority of the Court would accept this as a race-neutral reason for the prosecutor to exclude the juror.

Justice Stevens emphasized that reasons must be more than simply race-neutral. The prosecution must show that the basis for the challenge is "legitimate," "related to the particular case to be tried," and "sufficiently persuasive to 'rebu[t] a defendant's prima facie case.'"[20] Counsel seeking illumination on what reasons Justice Stevens considers adequate will find that he expressed the answer in negatives. Reasons that have a "significant disproportionate impact will rarely qualify" because that impact itself is evidence of evil intent.[21] Concerns or reasons that can be addressed by other means, such as judicial instructions, are not adequate because they are "not in fact 'related to the particular case to be tried.'"[22] Finally, "frivolous or illegitimate" justifications will not rebut the prima facie showing of purposeful discrimination.[23]

Justice Stevens concluded his analysis of the issues at this point. Because the prosecutor's proffered reasons carried a disproportionate impact, could be accommodated by less drastic means, and would—if valid—have supported a challenge for cause, these reasons were not sufficient to overcome the prima facie showing of purposeful discrimination.[24] This conclusion reveals the importance of Justice Stevens' argument that no dispute arose over whether the defendant met his initial burden of a prima facie case. The defendant's initial showing was sufficient to shift the burden of proof to the prosecution. Because Justice Stevens held that the prosecutor failed to offer a legitimate explanation for his peremptory challenge, the Justice never needed to reach the question of whether the proffered reason was sufficient to rebut the initial showing. Perhaps even more significant, by dismissing the purported basis of the peremptory challenge as illegitimate, Justice Stevens did not have to wrestle with, or accord deference to, the trial court's findings of fact concerning the prosecutor's intent. He actually goes so far as to find that the Court erred by focusing its entire attention on the subjective state of mind of the prosecutor.[25]

The plurality's analysis takes things one step farther. Having found that the prosecution had responded by offering a reason for his challenge that was facially neutral, Justice Kennedy addressed the issue of whether the

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[15] *Id.*

[16] *Id.* at 1866-67.

[17] *Id.* at 1867-68.

[18] *Id.* at 1873-74.

[19] *Id.* at 1874.

[20] *Id.* at 1875 (citing *Batson*, 476 U.S. at 98 n.28).

[21] *Id.*

[22] *Id.* (citing *Batson*, 476 U.S. at 98).

[23] *Id.* at 1876.

[24] *Id.*

[25] *Id.*

defendant proved that the prosecutor engaged in purposeful discrimination.[26] Only then would Justice Kennedy consider evidence of the racial impact of the peremptory challenge. While the use of a peremptory challenge may have a discriminatory impact, this impact does not undermine the facial validity—that is, the neutrality—of a reason. Instead, a court must consider this impact as evidence of a prosecutor's underlying intent or purposefulness. Then the court also must assess the strength of the defendant's initial showing and the merit of the neutral reasons proffered by the prosecution. Justice Kennedy pointed out, however, that the decisions of the trial court must be accorded deference because they amount to findings of fact on the issue of intent,[27] and that the trial court's decisions must not be overturned unless they are clearly erroneous.[28] In this case, he held that the finding was not clearly erroneous despite an apparent disproportionate impact on Hispanic-Americans.

Justice O'Connor was unwilling to go as far as the plurality. She apparently saw no need to go through an additional step to determine whether the defendant met his burden. In Justice O'Connor's opinion, the defendant must present sufficient evidence to establish the prima facie case of discrimination. The prosecutor then must endeavor to rebut this evidence by showing a neutral reason for the peremptory challenge. Finally, when both sides have had their says, the trial judge must make a decision. Justice O'Connor would review this determination by the trial court under a clear error test.[29] When the trial court's finding as to discriminatory intent is not clearly erroneous, the trial court will be upheld. In this case, Justice O'Connor ruled that the court's finding was not clearly erroneous and thus must be upheld.[30]

Although the Justices failed to unite in a clear majority in *Hernandez*, their various opinions demonstrate that a majority of them have reached a consensus with respect to several conclusions about *Batson* and its required procedure. First, the procedure consists of three steps: (1) the defendant's preliminary showing; (2) the prosecutor's neutral reasons; and (3) the trial court's assessment of whether the defendant has met the burden of showing purposeful discrimination. Second, a "neutral reason" is one that is facially other than the race of the potential juror. Third, disproportionate impact is irrelevant to whether a proffered reason is neutral, but is relevant in the final analysis on the issue of intent or pretext. Finally, prudent prosecutors will ask for, and trial judges should render, findings of fact whenever the court denies a *Batson* challenge.

What remains uncertain in light of *Hernandez* is the allocation of burdens throughout the three-step *Batson* inquiry. For example, the extent of the accused's burden with respect to an initial showing is unclear. Justice Stevens would impose a minimal burden on an accused, apparently requiring only common ethnicity between the accused and the excluded jury members combined with a timely objection by the defense.[31] The military courts offer no clarification on this issue. While a majority of the Army Court of Military Review has adopted a per se rule akin to that advocated by Justice Stevens,[32] the Court of Military Appeals rejected a similar per se rule in *United States v. Santiago-Davila*.[33] Because neither the plurality opinion of Justice Kennedy nor the concurring opinion of Justice O'Connor addresses the initial burden on the accused, the extent of that burden remains unclear. This uncertainty is compounded by the possibility that government conduct, such as a peremptory challenge, may be entitled to a judicial presumption of propriety, as was recognized in *Swain v. Alabama*.[34]

Defense counsel analyzing *Hernandez* should note immediately that the defense challenge to the peremptory challenges rested solely on the assertions that the challenges were exercised against members of the accused's ethnic group and that the impact of the peremptories was to exclude Hispanics from the venire. Defense counsel proffered no additional evidence of purposefulness or intent. *Hernandez* shows that even in those cases in which peremptory challenges have a disparate impact on the racial content of the jury, in the face of a proffered non-racial reason, the burden of production will rest on the accused. Defense counsel should be prepared to prove purposefulness, intent, or evil design by other objective evidence.[35] Some possible evidence would include the prosecutor's pattern of peremptory strikes;[36] the prosecutor's reputation, race, or ethnic background; the prosecutor's membership in discriminatory private clubs or

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[26] *Id.* at 1868.

[27] *Id.* at 1869-70.

[28] *Id.* at 1871.

[29] *Id.* at 1873.

[30] *Id.*

[31] The defense counsel objected generally to the exclusion of Hispanic jurors and charged that the prosecutor feared the Hispanics would be sympathetic to the accused. *Id.* at 1865. Justice Stevens notes that no one disputed the adequacy of the prima facie showing. *Id.* at 1877.

[32] United States v. Moore, 26 M.J. 692 (A.C.M.R. 1988)(en banc), *set aside and remanded*, 28 M.J. 366 (C.M.A. 1989).

[33] 26 M.J. 380 (C.M.A. 1988).

[34] 380 U.S. 202, 221-22 (1965).

[35] In *Batson* the Court specifically noted that the defendant should point out "any other relevant circumstances" to raise an inference of discriminatory intent. 476 U.S. at 96.

[36] *Id.* at 97.

associations; the absence of voir dire supporting the proffered reason for the challenge;[37] hostile nature of the prosecutor's questions during voir dire;[38] whether racial issues such as cross racial identification or interracial crimes are present in the case;[39] or a history of discriminatory practices by local prosecutors in general.

Defense counsel may find that demonstrating that the Government's single peremptory challenge was purposefully discriminatory is more difficult in military practice. This is particularly true when the exercise of that challenge does not remove all members of the accused's race from the jury. The fact remains, however, that even a single discriminatory challenge is abhorrent to the integrity of the criminal justice system. The Court of Military Appeals has indicated that in courts-martial, the burden upon the defense for an initial showing of discriminatory purpose is not high.[40] Defense counsel should emphasize in his or her objections that the prosecutor's exercise of the only challenge available to the government was against a member of the accused's racial group—a fact that is in and of itself suspect. Counsel should then weave in those other objective circumstances to urge upon the military judge that, at the very least, the inquiry is appropriate[41]—for example, that the peremptory challenge created a number of members which mathematically is unfavorable for the prosecution.

Another area of uncertainty is the extent of the burden the prosecutor must meet to rebut the defense's preliminary showing of discriminatory intent. The plurality seemed to indicate that the prosecutor will put the issue into the hands of the trial judge for a determination of whether the defendant demonstrated purposeful discrimination merely by showing a nonracial reason for the peremptory challenge. Justice O'Connor called only for an explanation based on factors other than race. Justice Stevens, on the other hand, required separate review of the purported reason, the impact of the challenge, and alternatives to excusal before the proffered reason ever will be balanced against the preliminary showing.

A quick head count may lead prosecutors to conclude that a majority of the justices call only for a reason based on some factor other than an intent to discriminate. Even so, prosecutors should exercise caution in their uses of peremptory challenges. *Batson* requires prosecutors to justify their exclusions with reasons that are related to the cases being tried.[42] These reasons need not reach the level of a challenge for cause,[43] but a simple affirmation of good faith or neutrality will not suffice.[44] Nor may the prosecution strike jurors out of a concern that they would be partial to an accused of the same race.[45] Beyond *Batson* itself, however, neutral explanations are ill defined. As a result, trial judges may look to Justice Stevens' opinion in *Hernandez* for a methodology to evaluate a prosecutor's reasons.[46] Prosecutors clearly must make a record, probably during voir dire, of the existence of a non-racial reason to exercise the challenge. What will suffice? A reason should be more than frivolous, but less than due cause. A reason should not reflect intentional discrimination and should have no discriminatory impact. A reason must warrant the juror's removal and may not be capable of accommodation by instructions or less drastic means. What sort of reason will fit these criteria, however, is up to the prosecutor to discover.

Finally, a question remains about the procedure and burden in step three of the process. Must *Batson*'s third step consist of an evidentiary hearing? By showing a facially valid reason for a peremptory challenge, does the prosecutor "wipe the slate clean" and place the initial burden back on the accused? If, as Justice O'Connor suggested, step three is a simple judicial evaluation of whether the prosecutor's proffered reason is based on race, what is the key to the prosecutor's intent? *Hernandez* provides no help. Justice Stevens never reached step three, and the other opinions merely review the trial court's factual conclusion for evidence of clear error.

Five years after being decided, *Batson* remains unclear. Perhaps some of the uncertainty may be attributed to liberal or conservative political philosophies reflected in

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[37] *See Santiago-Davila*, 26 M.J. at 391.

[38] *See Batson*, 476 U.S. at 97.

[39] *See* Note, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 Va. L. Rev. 811, 824 (1988).

[40] In *Santiago-Davila*, the court looked largely to the fact that the defendant was "a Puerto Rican and that the Government utilized its only peremptory challenge to excuse the only court member with an Hispanic surname who 'grew up' in Puerto Rico." 26 M.J. at 391.

[41] In *Batson*, the Supreme Court called upon trial judges to conduct a "sensitive" inquiry when assessing the adequacy of the accused's initial showing. 476 U.S. at 93.

[42] 476 U.S. at 98.

[43] *Id.* at 97.

[44] *Id.* at 98.

[45] *Id.* at 97.

[46] 111 S. Ct. at 1877.

the apportionment of the burden of proof. Whatever the reason for uncertainty, discriminatory use of peremptory challenges undermines both the actual fairness and perceived fairness of a judicial proceeding. All parties to a judicial proceeding share the responsibility of maintaining fairness, to include avoiding and challenging improper discriminatory practices.

California v. Acevedo: The Supreme Court Abandons the *Chadwick-Sanders* Rule

The Court's recent decision in *California v. Acevedo*[47] demonstrates the consequences of the change in membership of the Court. In *Acevedo* the dissenters in *United States v. Chadwick*[48] and *Arkansas v. Sanders*[49] joined with newly appointed members of the Court to form a majority, and the justices who were on the majority in those two opinions became the dissenters. The Court's opinion upholds the warrantless search of a closed container in a car even though the police conducting the search had no probable cause to search the car, and their probable cause to search the container arose before the container was placed in the automobile. The strident language of the dissent is striking. Justice Stevens declared that the majority opinion merely "pays lip service" to the Court's long-avowed preference for warranted searches,[50] adding that decisions like *Acevedo* prove that "this Court has become a loyal foot soldier in the Executive's fight against crime."[51]

The majority actually echoed the preference for warranted searches, even though it upheld the warrantless search. Justice Scalia's concurring opinion, however, appears to abandon that preference altogether. Justice Scalia held that the touchstone for the fourth amendment always has been reasonableness. Noting that under colonial law, the purpose of a warrant was to immunize police officers from civil suits,[52] he remarked that the fourth amendments's explicit language regarding warrants only serves to restrict their issuance, rather than to require their use. "By restricting the issuance of warrants," Justice Scalia stated, "the Framers endeavored to preserve the jury's role in regulating searches and seizures" by finding police officials who initiated unreasonable searches or seizures liable in civil actions.[53] The Justice added that "for some years after ... our announcement of the exclusionary rule in *Weeks v. United States*[54] ... our jurisprudence lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone."[55] The expressed preference for a warrant in the late 1960's was only an illusory victory.[56] He concluded that the warrant requirement has become "so riddled with exceptions that it [is] basically unrecognizable. In 1985, one commentator cataloged nearly 20 exceptions .... Since then we have added at least two more .... searches of mobile homes ... [and] searches of offices of government employees."[57] The doctrine of judicial preference for warrants is moribund and should be abandoned.

In *Acevedo* the Court resolved the inconsistency between the precedents set in *Carroll v. United States*[58] and *Chambers v. Maroney*[59] and the *Chadwick-Sanders* lines of cases. In *Arkansas v. Sanders* the Court required a warrant when probable cause related solely to the containers placed within the vehicle, but not to the car itself. In both *Sanders* and *United States v. Chadwick* it required warrants when no contact between the container and the vehicle occurred before the container was placed in the vehicle. On the other hand, in both *Carroll* and *Chambers*—and in the subsequent decision in *United States v. Ross*[60]—the Court held that once police establish probable cause to search a vehicle and the existence of exigent circumstances, they may conduct a warrantless search of the entire vehicle, including closed containers that might contain the object of the search. In *Acevedo* the Court effectively overruled the *Chadwick-Sanders* line of cases, holding that these rules offered "minimal" protection to a suspect's expectation of privacy.[61] The Court noted that police often are able to

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[47] 111 S. Ct. 1982 (1991).

[48] 433 U.S. 1 (1977).

[49] 442 U.S. 753 (1979).

[50] *Acevedo*, 111 S. Ct. at 1994.

[51] *Id.* at 2002.

[52] *Id.* at 1992.

[53] *Id.* at 2214.

[54] 232 U.S. 383 (1914).

[55] *Acevedo*, 111 S. Ct. at 1992 (citing Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1178-80 (1991)). "It is not that a search or seizure *without* a warrant was presumptively *un*reasonable, as the Court has assumed; rather, a search or seizure *with* a warrant was presumed reasonable as a matter of law—and thus immune from jury oversight." *Id.* at 1179-80.

[56] *Id.* at 1992.

[57] *Id.*; *see generally* E. Imwinkelried, P. Giannelli, F. Gilligan, & F. Lederer, Courtroom Criminal Evidence §§ 1814, 1815, 1818.1, 1828 and chap. 20 (1987 & Supp. 1990) [hereinafter Imwinkelried].

[58] 267 U.S. 132 (1925).

[59] 399 U.S. 42 (1970).

[60] 456 U.S. 798 (1982).

[61] *Acevedo*, 111 S. Ct. at 1989.

search containers without a warrant despite the *Chadwick-Sanders* rule.[62] For example, if the police arrested an occupant of an automobile, they could then conduct a search of the interior of the automobile, including closed containers, incident to the occupant's arrest.[63] Likewise, if the police had probable cause only with respect to the container—but not to the car in which the container was located—and the police arrested the driver and impounded the car the police could then conduct an inventory pursuant to standard operating procedures of the entire vehicle including closed containers.[64] The disagreement between the majority and the dissent might have been resolved if the majority had pronounced that the automobile exception and the search of containers may not be made unless truly exigent circumstances exist.[65] This would have maximized fourth amendment protection and might have answered the arguments of both sides.

The dispute between the majority and dissent can be best addressed in terms of the three topics chosen by Justice Stevens: confusion, the privacy argument, and the burden on law enforcement.[66]

In his majority opinion, Justice Blackmun stated that the *Chadwick-Sanders* rule "not only has failed to protect privacy, but it has confused courts and police officers and impeded effective law enforcement .... For example, when an officer who has developed probable cause to believe that a vehicle contains drugs begins to search the vehicle and immediately discovers a closed container, which rule applies?"[67] He asserted, "If the police know that they may open a bag only if they are actually searching the entire car, they must search more extensively than they otherwise would in order to establish the general probable cause required by *Ross*."[68] He concluded, "We cannot see the benefit of a rule that requires law enforcement officers to conduct a more intrusive search in order to justify a less intrusive one."[69] The dissent criticized Justice Blackmun's conclusion, objecting that the majority could not mean to "suggest that evidence found during a course of a search may provide the probable cause that justifies the search. Our cases have unequivocally rejected this bootstrap justification for a search that was not lawful when it commenced."[70]

The dissenters are right. The Court did not suggest that one could justify a search and probable cause based on what is found. Actually, the majority suggested only two scenarios in which police may conduct a warrantless search. The first scenario would eliminate the warrant requirement when an officer, by articulating probable cause to search a container, articulates probable cause to search the entire vehicle as well. Under these circumstances, the police actually restrict the scope of their intrusion by articulating probable cause only as to the containers. In the second scenario, when police have probable cause relating both to the container and the vehicle, and they search the containers before they search the vehicle, the officers will continue to search the vehicle to support their argument that they had probable cause to search both.

Both the majority and dissent easily could have avoided the confusion resulting from their respective analyses by applying a bright-line rule that has been adopted by some lower courts.[71] Those courts have held that when police have probable cause to search the container and obtained that probable cause before the container had any relationship to the car, neither doctrine should allow a search of the entire vehicle.

With respect to the privacy argument, the Court based its statement that the *Chadwick-Sanders* rule provides only "minimal protection for privacy"[72] on at least four factors. First, if an individual is arrested, police may search the interior of the vehicle, and any closed containers they might find there, incident to the individual's arrest. Past cases revealed that, under those circumstances, police commonly search closed containers without a warrant.[73] Second, if police search an individual, and impound his or her vehicle, police may then inventory the contents of the vehicle pursuant to standard operating procedure and may, in the course of this inventory, open closed containers and examine their contents.[74] Third, even if *Chadwick-Sanders* prohibited a warrantless

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[62] *Id.*

[63] *See* New York v. Belton, 453 U.S. 454 (1981).

[64] Imwinkelried, *supra* note 57, at § 2034.

[65] *See* W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 7.2(d), at 54 (2d ed. 1987) [hereinafter LaFave].

[66] *See Acevedo*, 111 S. Ct. at 1998.

[67] *Id.* at 1991.

[68] *Id.* at 1989.

[69] *Id.* at 1990.

[70] *Id.* at 1999 n.9.

[71] *See, e.g., United States v. Barrett*, 890 F.2d 855 (6th Cir. 1989).

[72] *Acevedo*, 111 S. Ct. at 1989.

[73] *See id.*

[74] *Id.*

search, police could hold the container until they obtain a search warrant. This substantially diminishes the protection *Chadwick-Sanders* purports to convey because a warrant "routinely [will be] forthcoming in the overwhelming majority of cases."[75] "Finally, the search of a paper bag intrudes far less on individual privacy than does the incursion sanctioned long ago in *Carroll* ..." in which prohibition agents literally destroyed the interior of a vehicle in a search for concealed alcohol.[76]

In response, the dissenters asserted:

> Every citizen clearly has an interest in the privacy of the contents of his or her luggage, briefcase, handbag or any other container that conceals private papers and effects from public scrutiny .... Under the Court's holding today, [however,] the privacy interest that protects the contents of a suitcase or a briefcase from a warrantless search when it is in public view simply vanishes when its owner climbs into a taxicab.[77]

The dissent rejected the majority's assertion that permitting the police to search closed containers without a warrant results in only a minimal loss of privacy, remarking that one must remember that *Belton* applies only to searches of the interior of a vehicle, despite the majority's effort to "extend[] its holding to a container placed in the *trunk* of a vehicle rather than in the passenger compartment."[78]

Finally, the majority and the dissent take an interesting view of legal literature. The majority supports its argument with a quote from professor Wayne LaFave: "These two lines of authority [*Carroll-Chambers* and *Chadwick-Sanders*] cannot be completely reconciled, and thus how one comes out in the container-in-the-car situation depends upon which line of authority is used as a point of departure."[79] The dissenters respond that this sentence "at most, indicates that ... there may be some factual situations at the margin of relevant rules that are difficult to decide."[80] Moreover, to the extent that professor LaFave criticizes Supreme Court jurisprudence, he is critical of *Ross* rather than *Chadwick* or *Sanders*.[81]

The majority asserted that the confusion resulting from the conflict between the *Carroll* doctrine and the *Chadwick-Sanders* rule not only embrangles the courts, but also impedes law enforcement activities nationwide.[82] The only adequate solution, the Court contended, is to reconcile the cases by eliminating the distinction between searches based on probable cause relating to the containers that are searched and searches based on probable cause relating to the car in which the containers are located.[83] The dissenters responded that the differences between these doctrines have had no adverse impact on law-enforcement. They note that the Court upheld the constitutionality of the search or seizure in twenty-seven of the Court's last thirty cases involving narcotics and the fourth amendment.[84] The majority, in turn, contended that these statistics are indicative not of a lack of impact on police, but of the widespread confusion the *Chadwick-Sanders* rule has spread among the lower courts. The majority specifically pointed out that the United States Supreme Court has had to reverse the lower courts on this issue in twenty-nine decisions since 1982.[85]

Bad Press—*Mu'Min v. Virginia* and the Need for Individual Voir Dire

In *Mu'Min v. Virginia*[86] the Court held that a trial judge need not ask individual jurors content-specific questions about pretrial publicity when the jurors neither formed an opinion from this publicity nor demonstrated any bias or prejudice against the defendant. This five-four decision is fact specific; moreover, it contains warnings from Justice O'Connor's concurring opinion, and from Justice Kennedy's dissent that a trial judge should do more. Justice Kennedy stated, "[T]he questions which the trial judge asked in this case would suffice if he asked them of individual jurors and received meaningful responses."[87] He remarked that the judge's failure to ask these questions individually rendered "the questions ...

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[75] *Id.*

[76] *Id.*

[77] *Id.* at 2001.

[78] *Id.* (emphasis in original).

[79] *Id.* at 1989 (citing LaFave, *supra* note 65, at 53).

[80] *Id.* at 2000 (citing LaFave, *supra* note 65, at 55-56).

[81] *Id.*; *see also* LaFave, *supra* note 65, at 53.

[82] *Id.* at 1989.

[83] *See id.*

[84] *Id.* at 2002.

[85] *Id.* at 1990.

[86] 111 S. Ct. 1899 (1991).

[87] *Id.* at 1919.

deficient in that the prospective jurors could simply remain silent as an implied indication of a lack of bias or prejudice. This gave the trial court no effective opportunity to assess the demeanor of each prospective juror in disclaiming bias."[88]

Mu'Min was an inmate in the Virginia's Haymarket Correctional Unit, serving a forty-eight year sentence for first degree murder. While on a work detail, under the supervision of the Virginia Department of Transportation, he escaped over a perimeter fence and made his way to a nearby shopping center. Using a sharp instrument, he murdered and robbed Gladys Nopwasky, the owner of a retail carpet and clothing store.

About three months before the trial the defendant submitted a motion for a change of venue, basing this motion on forty-seven newspaper articles relating to the murder. These articles discussed the murder in detail; they also revealed that Mu'Min was serving a sentence for murder at the time of his escape, that the death penalty had not been available at the time of this earlier murder, that Mu'Min had been denied parole six times, that he had committed numerous disciplinary infractions throughout his time in prison, and that he had confessed to killing Gladys Nopwasky. Several of the articles focused on the laxity and supervision of work gangs and argued for a change in the prison work system.

At trial, the defense proposed sixty-four voir dire questions, moving that the trial judge ask each juror these questions in individual voir dire. The trial judge denied the motion for individual voir dire, indicating that he instead would break the venire into panels of four for questioning. The trial judge refused to ask any questions relating to the content of the news stories. When anyone indicated that he or she was familiar with the accounts in the news media, the judge responded, not by asking the prospective jurors about the source or content of the accounts, but by asking the panel as a whole the following questions:

> Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case? ...
>
> ....
>
> Is there anyone [of you] that would say what you've read, seen, heard, or whatever information you may have acquired from whatever the source would affect your impartiality so that you could not be impartial? ...
>
> ....
>
> Considering what the ladies and gentlemen who have answered in the affirmative have heard or read about this case, do you believe that you can enter the jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused? ...
>
> ....
>
> In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired about this case, is there anyone who believes that you could not become a juror, enter the jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?[89]

The judge dismissed one of the sixteen panel members, who openly admitted that he had prior knowledge and could not render an impartial judgment.[90] Whenever a potential juror indicated that he or she had heard or read something, the judge asked the jurors as a group if they had formed an opinion, and whether they could be impartial. None of those seated indicated that he or she had formed an opinion or gave any indication of bias or prejudice against the defendant.

If a juror admitted that he or she had discussed the case with someone else, the judge asked that juror follow-up questions. If the juror equivocated, as one juror did, the judge removed the juror sua sponte. The judge dismissed two more jurors because of their views of the death penalty. Of the twelve jurors who ultimately took their places in the jury box, not one gave any affirmative indication that he or she had formed an opinion about the case or would be biased in any way.

The Court, reviewing its prior decisions, distinguished this case from *Irvin v. Dowd*.[91] In *Irvin* the trial court excused over half of a panel of 430 persons because of their affixed opinions as to the defendant's guilt.[92] Moreover, in *Dowd*, a barrage of immediate publicity occurred, in which ninety-five percent of the households in the county received the newspaper accounts, so that two-thirds of the jurors actually seated had formed an opinion that the defendant was guilty and acknowledged familiarity with the facts in the case.[93] The Court indicated that this was a far cry from what happened in *Mu'Min*. The dissenters objected that the majority's deci-

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[88] *Id.* (citing 239 Va. 433, 457, 389 S.E.2d 886, 901 (1990) (Whiting, J., dissenting)).

[89] *Mu'Min*, 111 S. Ct. at 1902.

[90] *Id.*

[91] 366 U.S. 717 (1961).

[92] *Id.* at 725.

[93] *Id.* at 728.

sion turned the sixth amendment right to an impartial jury into a "hollow formality."[94] Rather than requiring the trial judge to ask individual jurors pertinent questions about what they knew, "the majority [held] that the trial court discharged its obligation to ensure the jurors' impartiality by merely asking the jurors whether *they* thought they could be fair."[95] As indicated above, one of the justices concurring with the majority, as well as a justice concurring with the dissent, thought the judge should have asked individual questions.[96] The message for trial judges is clear—although *Mu'Min* may permit a trial judge to dispense with questioning individual venirepersons on voir dire, the better practice is to take the time to inquire into the fairness of each potential juror.

McCleskey v. Zant: The Supreme Court Clarifies the Abuse of Writ Doctrine

On 16 April 1991, the Supreme Court limited the number of habeas corpus petitions a prisoner on death row can file. In *McCleskey v. Zant*[97] the Court clarified the standards and procedures by which federal courts should determine whether a prisoner has committed an abuse of a writ of habeas corpus. In this decision, the Court found that McCleskey committed "an abuse of the writ" when he presented a claim under *Massiah v. United States*[98] that he had failed to raise in an earlier petition. Accordingly, the Court denied him relief on that claim, affirming the decision of the Eleventh Circuit Court of Appeals.[99]

In *McCleskey v. Zant* McCleskey and three others robbed a furniture store. One of the robbers shot and killed an off-duty policeman. McCleskey confessed to police that he participated in the robbery. At trial, however, he denied involvement in both the robbery and the murder. In rebuttal, the government called Offie Evans, who occupied the jail cell adjacent to McCleskey's. Evans testified that while in jail, McCleskey boasted about shooting the officer. McCleskey was convicted and sentenced to death. After his conviction, he pursued direct and collateral appeals for more than ten years.[100]

At one point, McCleskey filed a direct appeal to the Supreme Court of Georgia. In this appeal, McCleskey claimed that the prosecution violated the rule of *Brady v. Maryland*[101] by failing to disclose Evans' statement to the defense prior to trial, but did not claim a violation of his rights under *Massiah v. United States*. The court denied McCleskey's appeal. McCleskey then filed a state petition for habeas corpus relief. The state petition, as amended, contained twenty-three challenges to his conviction and death sentence, including a claim that the admission of the police officer's testimony violated McCleskey's sixth amendment right to counsel under *Massiah*. After the state denied relief, McCleskey filed a federal habeas petition, but did not include a claim under *Massiah*. McCleskey did, however, raise a *Massiah* claim in a second federal habeas petition.[102]

The federal district court granted relief on McCleskey's second habeas petition. The court found that jail authorities had placed Evans in the cell adjoining McCleskey's for the purpose of gathering incriminating evidence, in violation of McCleskey's rights under *Massiah*. The Eleventh Circuit Court of Appeals reversed. The court of appeals applied a standard identical to that followed by the district court, ruling that to prevail, McCleskey had to show that he had not abandoned the *Massiah* claim deliberately in his first federal habeas petition and that his failure to raise this claim in the first petition was not because of inexcusable neglect. The court of appeals, however, reached a different conclusion. The court found that, because McCleskey raised *Massiah* in his state petition of habeas corpus, then failed to mention this claim in his first federal habeas petition, and finally attempted to resurrect it in the second federal petition, he effectively had abandoned the *Massiah* claim. Accordingly, the Eleventh Circuit ruled that the district court had misconstrued the meaning of deliberate abandonment and reversed.[103]

The Supreme Court affirmed the decision of the Eleventh Circuit. The Court held that McCleskey's attempt to raise a *Massiah* claim in his second federal petition

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[94] *Mu'Min*, 111 S. Ct. at 1906.

[95] *Id.* at 1910 (Marshall, J., dissenting).

[96] *Id.* at 1919.

[97] 111 S. Ct. 1454 (1991). *See generally* F. Gilligan & F. Lederer, *supra* note 1 at chap. 26 (1991).

[98] 377 U.S. 201 (1964).

[99] *McCleskey*, 111 S. Ct. at 1475.

[100] *Id.* at 1458.

[101] 373 U.S. 83 (1963).

[102] *McCleskey*, 111 S. Ct. at 1459. The court denied relief pursuant to a second state habeas petition as well. In this action, McCleskey alleged that the State had an agreement with Evans that it failed to disclose. After a hearing, the petition was dismissed.

[103] *Id.* at 1460.

after failing to raise a *Massiah* claim in his first petition constituted abuse of the writ. Moreover, after reviewing past federal habeas decisions, the Court held that a petitioner need not abandon a claim deliberately in an earlier petition for the inclusion of the claim in a subsequent petition to constitute an abuse of the writ. The attempt to include the claim amounts to abuse if the petitioner could have raised the claim in the first petition, but failed to do so through inexcusable neglect.[104]

The Court concluded that the decisions of lower courts demonstrated that a great deal of confusion exists in the application of the abuse of writ doctrine in successive habeas petitions. To eliminate this confusion, the Court adopted a cause and effect analysis to govern the application of the abuse of the writ doctrine. The new procedure is straightforward. Under the cause and effect analysis, the Government has the burden of pleading abuse of the writ. Once the Government meets its burden, however, the petitioner must show that he or she has not abused the writ by seeking habeas relief.[105]

The Government meets its burden of proof by outlining the petitioner's prior writ history and identifying the claims that are raised for the first time in a subsequent petition. The presentation of this evidence shifts the burden, forcing the petitioner to disprove the Government's showing that the petitioner has abused the writ. The petitioner first must show good cause for failing to raise the claim in an earlier petition. To show good cause, the petitioner must show some objective factor—such as interference by military officials—that hampered counsel's efforts to raise a claim at the appropriate time. Once the petitioner establishes good cause, he or she then must show that the Government misconduct alleged in the petition actually prejudiced the petitioner's defense at trial.[106]

The Court adopted the cause and effect analysis because the doctrines of procedural default and abuse of the writ implicate nearly identical concerns. The Court reasoned that consideration of repeated habeas petitions undermines the law's interest in finality. Moreover, the Court considered the impact of repeated habeas review on the federal courts, concluding that federal collateral litigation places a heavy burden on scarce judicial resources, thereby threatening the capacity of the system to resolve primary disputes. The cause and effect analysis encourages judicial economy by eliminating any incentive for litigants to withhold claims.[107]

The cause and effect analysis, when applied to the abuse of writ doctrine, will enable courts to determine from a petitioner's past conduct whether he or she has a legitimate excuse for failing to raise a claim at the appropriate time. The analysis is well defined and will add predictability to judicial decision making. Moreover, its application clarifies the limits of "inexcusable neglect," providing critical guidance to judges. Most importantly, the cause and effect standard should curtail the abusive habeas practice that has undermined the integrity of the habeas process.[108]

The Court, however, maintained one exception to the cause and effect analysis. The lower court may excuse a petitioner's failure to raise a claim in an earlier petition if the petitioner can show that the failure to entertain the claim in the subsequent petition would result in a fundamental miscarriage of justice.[109] In applying the cause and effect analysis to the facts in *McCleskey*, the Court found that no cause justified McCleskey's failure to raise the *Massiah* claim in his first federal habeas petition. The Court held, moreover, that a fundamental miscarriage of justice would not result if a lower court refused to consider the *Massiah* claim asserted in McCleskey's second federal habeas petition.[110]

The procedures and standards the Court established in *McCleskey* are readily applicable to the military. *McCleskey* should limit the number of collateral attacks on courts-martial convictions. In most cases, petitioners will be limited to a single petition. Moreover, *McCleskey*'s procedures and standards facilitate preparation of the military's response to successive petitions. Finally, the Court's decision recognizes the law's interest in finality. The application of *McCleskey* not only will eliminate incentives for prisoners to withhold claims for manipulative purposes, but also will eliminate disruptions that occur when a claim is presented for the first time in a second or subsequent federal habeas petition.

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[104] *Id.* at 1468; *see also* Sanders v. United States, 373 U.S. 1 (1965).

[105] *McCleskey*, 111 S. Ct. at 1470.

[106] *Id.*; *see also Murray v. Carrier*, 477 U.S. 478 (1986).

[107] *McCleskey*, 111 S. Ct. at 1469, 1471.

[108] *Id.* at 1471.

[109] *Id.* at 1470-71.

[110] *Id.* at 1475.

Criminal Law Division Note

Professional Responsibility

The Continuing Legal Education Workshop, held in Charlottesville, Virginia, in April, 1991, devoted five hours to the topic of professional responsibility. Major General Fugh, The Judge Advocate General, wanted a participatory conference to hear from the conferees how professional responsibility was being handled in the Judge Advocate General's Corps. To accomplish this, he asked me to give a lecture outlining some of the areas dealing with professional responsibility.

At the end of the talk, the conferees, among whom were the students of the Judge Advocate Officer Graduate Course, split up into seventeen seminar groups. The seminar leaders then asked each conferee in the seminar group to write down on a card one thing that he or she thought that judge advocates are doing well in the area of professional responsibility and then to write down on another card one thing that should be changed. The leaders culled the responses to eliminate redundancies and listed the remaining suggestions on butcher paper.

Each group discussed the pros and cons of each of the suggestions and, upon the completion of the seminar, the attendees voted on whether they agreed with the suggestions. The seminar leaders then met to review the suggestions and to identify the changes that could be made immediately to improve our system. The Judge Advocate General reviewed their recommendations and now is acting on them.

The first recommendation was that when an ethical inquiry is completed, the individual who was the subject of the inquiry should be notified of the results directly, rather than through his or her supervisory judge advocate or the Department of the Army Inspector General. This direct contact ensures immediate notification and serves as a clear indication of finality. We adopted this proposal, and hereafter we will send close-out letters directly to the subjects of ethical inquiries.

The second recommendation was to publish in *The Army Lawyer* a periodic summary of ethical inquiries conducted under Army Regulation 27-1. This recommendation was adopted, subject to the reservation that, to preserve the privacy of the inquiry and to decrease speculation about who was involved in a specific case, no names will be published in these summaries. Publication of summaries will benefit the Judge Advocate General's Corps in several ways. If used as a training vehicle by staff judge advocates (SJAs) in professional development courses, the summaries will promote an enhanced awareness of professional responsibility issues. Once they are set in print they also may serve as precedents for future cases.

The third recommendation suggested that summaries also be included as annotations to Department of the Army (DA) Pamphlet 27-26. The Judge Advocate General felt that the decision to adopt the second recommendation rendered this proposal superfluous. Publication of the summaries in *The Army Lawyer* not only serves the same purpose, but also does so much more efficiently. A DA pamphlet generally takes between six months and two years to publish—a slow, cumbersome process that would prevent timely dissemination of the summaries. Annotation would benefit Army attorneys by consolidating a history of completed inquiries in a single source. This objective can be achieved just as easily, however, by filing copies of *The Army Lawyer* on a monthly basis, and by ensuring that The Judge Advocate General's School continues to publish its desk book on professional responsibility for supervisory lawyers.

Publication of summaries of inquiries will assist in the fourth proposal—that is, supervisory staff judge advocates should enhance training on ethical rules and procedures. We see nothing new in this proposal. Staff judge advocates always have accepted the duty to train their subordinates and themselves in ethical responsibility as part of their overall professional development missions. This task, however, will be made easier by publishing the summaries of the inquiries, which should help to make ethical issues immediately relevant to those practicing today. To further assist in this training, an article by Lieutenant Colonel Michael Denny in the November 1988 issue of *The Army Lawyer* also could be used for the preparation of at least one professional development class.

Unrelated to the first four proposals, the fifth recommendation advised The Judge Advocate General to ask state authorities to determine whether an individual's state's rules would be paramount to ours in various factual situations. This question of priority is not new; at present, it is being litigated in the federal courts with respect to United States attorneys. A number of jurisdictions, however, already have ruled in our favor on this issue. The State of Oregon already has held that our rules would be paramount in governing the conduct of Army attorneys within the military criminal justice system. Virginia made the same answer in response to an informal inquiry concerning the practice of law by Army legal assistance attorneys. Nevertheless, The Judge Advocate General decided against asking every jurisdiction for a definitive ruling on this issue. Some states undoubtedly would be unwilling to give a binding advisory opinion, some would not answer, and some might hold their own rules to be paramount to our own.

A sixth recommendation was to "power down"—that is, to empower corps and divisional SJAs to resolve ethical inquiries, rather to withhold this power to major command SJAs, or the Executive Officer of the Office of The Judge Advocate General. We decided not to adopt this proposal. While it would both enhance the privacy of the inquiry and reflect confidence in the supervisory SJAs, it

would deprive the Office of The Judge Advocate General of information it needs for assignment purposes pursuant to article 6 of the Uniform Code of Military Justice.

Major General Fugh decided to re-establish the Professional Responsibility Committee, which will be made up of two permanent members with a third member appointed based upon the issue before the committee. This decision may have some disadvantages. The committee will be expensive to maintain and, depending on the location of committee members, it may be slow to resolve inquiries. The potential benefits of the decision, however, far outweigh these drawbacks. Bringing back the committee will allow The Judge Advocate General to maintain continuity, establish a precedent file and, above all, maintain the confidence of the legal profession in the ethical integrity of the Judge Advocate General's Corps.

The decision to re-establish the Professional Responsibility Committee gave rise to another proposal that reflected a concept that recently has received considerable media attention—lay involvement in our professional responsibility committee. The Judge Advocate General adopted this recommendation only in part. Non-lawyers will be appointed to assist in ethical investigations on a case-by-case basis when circumstances warrant lay involvement. The committee, however, will not need a layperson's guidance to resolve every ethical issue that may arise. Accordingly, The Judge Advocate General decided not to include a non-lawyer as a standing member of the committee.

Another proposal was to provide neutral screening officials for trial defense attorneys and trial counsel. Some attorneys think this would enhance confidence in the system and generate more thorough ethical inquiries. The Judge Advocate General decided not to adopt this proposal across the board. Rather, he will recommend that SJAs examine this on a case-by-case basis when appointing a preliminary screening official. To a certain extent, this decision merely formalizes an existing system—many SJAs already ask the judges to be their preliminary screening officials to ensure a neutral and detached investigation.

The final proposal argued for the establishment of a "bright line test" to exclude minor personal misconduct from reports of ethical misconduct made to the Executive Officer. This proposal raises the question whether the Army rules of professional ethics require all types of misconduct to be reported. Army Regulation 27-1 would appear to require exactly that, but this regulation must be balanced against Army Rule of Professional Conduct 8.4, which limits its definition of professional misconduct to "criminal act[s] that reflect[] adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects," and "conduct involving dishonesty, fraud, deceit, or misrepresentation." All things considered, coming up with a workable bright-line rule would be very difficult. Of necessity, the handling of each case must depend upon the totality of circumstances, including the type of misconduct involved, the number of instances of misconduct, where the misconduct took place, who was involved, and who was injured. Accordingly, we decided not to implement this suggestion.

Input from senior members of the Regiment was invaluable in weighing the pros and cons of the various suggestions. Thanks to all who participated. Colonel Gilligan.

Regimental News From the Desk of the Sergeant Major

Sergeant Major Carlo Roquemore

Noncommissioned Officer Training and Evaluation

This article provides updated information concerning the Noncommissioned Officer (NCO) Self-Development Test (SDT) and the NCOER System and outlines procedures for obtaining SDT publications. I also address an important update about our 71D/E BNCOC and ANCOC courses. I expect this material to be passed down to the lower echelons of our Regiment, so that the soldiers who need this information will receive it.

The Self-Development Test

Administration of the SDT will begin on 1 October 1991 for sergeants, staff sergeants, and sergeants first class within the active Army. Because the test is new, it will go through a two year validation process. This validation includes not only the test itself but also the scoring process. For this reason, the results of SDTs administered during FY 1992 and 1993 will not be used for Enlisted Personnel Management System (EPMS) purposes during those years.

Test periods, or windows, for SDT administration during FY 1992 will be published in Department of the Army Circular 350-91-1, *Army Individual Training Evaluation Program (ITEP) and Noncommissioned Officer Self-Development Test Announcement for Fiscal Year (FY) 1992*. This publication should be fielded on or about 31 August 1991. The first test window for active Army 71D/E NCOs has not been changed and remains August through October 1992.

The Commander, U.S. Army Training Support Center (ATSC), Fort Eustis, Virginia is currently testing a new procedure for processing test results, called "local

scanning". Local scanning allows Training Standards Officers (TSO) to electronically scan, edit, and transmit (via modem) SQT/SDT mark-sense forms to ATSC for immediate scoring and Individual Soldier's Report (ISR) feedback. Local scanning provides *same day turnaround of test results.* Fort Sill completed a pilot test of local scanning from March through June 1990, and Fort Gordon converted to local scanning on 18 March 1991. One more year of testing is expected for 75 additional TSOs world-wide and, if the program proves cost-effective, Army-wide implementation could begin in FY 93.

The Self-Development Test and NCO Evaluation Reports (NCOER)

As I stated above, FY 92 and 93 SDT scores will be used not for EPMS purposes, but for self-development purposes only. Neither the score nor any other reference to a NCO's performance on a SDT taken during FY 92 or 93 will be shown on the NCOER. Beginning in FY 94, however, SDT results will be linked to the EPMS and will become a key factor in promotions, school selections, and retention.

SDT Publications

Effective 10 June 1991, the United States Army Publications Distribution Center (USAPDC) changed the procedures for ordering publications in support of the new SDT . Units that ordered the four field manual (FM) publications as a set, using the old nomenclature "SDT PUBS" should have received the sets NLT 31 July 1991. Units that have not yet submitted an order should not use "SDT PUBS" as a nomenclature. Instead, they should prepare DA Form 4569, USAAGPC Requisition Code Sheet, using the following information:

ACCOUNT NUMBER	TYPE REQ	NOMENCLATURE	CHANGES	QUANTITY REQUIRED	UNIT OF ISSUE	ZIP CODE
	A	FM 22-100	ALL	1 Per	EA	Must
	A	FM 22-101	ALL	SGT, SSG	EA	match
	A	FM 22-102		and SFC	EA	account
		FM 25-101			EA	

DA Form 4569 is submitted to the local DOIM for forwarding to USAPDC. Units that ordered publications under the designation "SDT PUBS" should not reorder them, unless they fail to receive publications sets in response to their original orders, in which case they should use the procedures described above to order the publications individually.

Publication account holders should update their 12-Series requirements to reflect training copies required. Use DA Form 12-99-R and the following corresponding form and block numbers.

MANUAL	FORM NUMBER	BLOCK NUMBER
FM 22-100	DA 12-11E	BLOCK NUMBER 0180
FM 22-101	DA 12-11E	BLOCK NUMBER 0478
FM 22-102	DA 12-11E	BLOCK NUMBER 3859
FM 25-101	DA 12-11E	BLOCK NUMBER 4642

Basic and Advanced Noncommissioned Officer Courses

Chief legal NCOs and supervisors must take a personal interest in ensuring that NCOs who are scheduled to attend 71D/E BNCOC or ANCOC are *fully prepared* to attend the scheduled course. NCOs continue to arrive for training with weight and physical training (PT) problems. Five 71D/E NCOs have been academically eliminated from BNCOC/ANCOC during FY 91 for receiving double NO-GOs on the BRM period of instruction. Exceptions to policy granting a third attempt are extremely rare.

Though a soldier's records may indicate that he or she has qualified with the M16, the chief legal NCO or supervisor must get *personally* involved to determine that each soldier has gained actual proficiency through qualification or familiarization within the past year. Fort Benjamin Harrison uses the alternate (twenty-five meter) firing range. Supervisors should ensure NCOs get hands-on training with a weapon prior to qualification, concentrating on basic rifle marksmanship skills by means of "dime/washer" drills, box drills, breathing, and eight steady-hold factors.

Beginning with BNCOC Class 1-92 in October 1992, the method of training at the Fort Benjamin Harrison NCO Academy will change from standard classroom lecture/conference to Small Group Leadership (SGL) instruction. Using SGL principles, NCOs will be expected to "teach each other," with the instructors and cadre acting as moderators and counselors. NCOs should familiarize themselves with the MOS-specific tasks identified for training at BNCOC/ANCOC, which appear in the MOS Training Plan (Chapter 2 of the Soldier's Manual/Trainers Guide).

My POC for information covered in this article is SFC Phelps, LSC, USASSC, Fort Benjamin Harrison, IN, DSN 699-7865.

Personnel, Plans, and Training Office Note

Personnel, Plans, and Training Office, OTJAG

The Army Management Staff College

One Army civilian attorney recently was selected for the Army Management Staff College (AMSC) Class #91-3 (9 September 1991 thru 13 December 1991). The attorney selected is:

Michael P. Finn
GS-13, Headquarters, III Corps and Fort Hood
Fort Hood, Texas

Currently, one Army civilian attorney is attending AMSC Class 91-2: Stephen S. Malley, GS-12, Headquarters, National Training Center and Fort Irwin, Fort Irwin, California.

AMSC is a fourteen-week resident course designed to instruct Army leaders in functional relationships, philosophies, and systems relevant to the sustaining base environment. It provides civilian personnel with training analogous to the military intermediate service school level.

The Judge Advocate General encourages civilian attorneys to apply for AMSC as an integral part of their individual development plans. Local Civilian Personnel Offices are responsible for providing applications and instructions. Interested personnel also may obtain information contacting Mr. Roger Buckner, Personnel, Plans, and Training Office (AVN: 225-1353).

AMSC Class 92-1 will be held at the Radisson Mark Plaza Hotel in Alexandria, Virginia, from 13 January 1992 to 17 April 1992. **The Personnel Command (PERSCOM) application deadline for Class 92-1 is 16 September 1991.**

Please note that the listed deadline is the date the application must reach PERSCOM. Major commands and local civilian personnel offices may establish earlier deadlines for applications that they will process in their commands. United States Army Europe (USAREUR) attorneys are reminded that their applications must be routed through Headquarters, USAREUR and 7th Army because that headquarters provides funding for the course.

Please note that the civilian submission requirements for calendar year 1992 have changed. Applicants should submit the following, in an original and three copies:

(1) AMSC Application Form.

(2) Current DA 2302-R/2302-1-R. (Do *not* submit SF171, Application for Federal Employment.)

(3) Copies of three latest performance appraisals. (No original required).

Each attorney also should provide one copy of his or her application, with an attached endorsement by the supervising staff judge advocate or command legal counsel, to the following address:

HQDA (DAJA-PT)
ATTN: Mr. Buckner
Pentagon, Room 2E443
Washington, DC 20310-2206

Guard and Reserve Affairs Item

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Update to 1992 Academic Year On-Site Schedule

The following information is an update of the 1992 academic year Continuing Legal Education (On-Site) Training Schedule, which appeared in the August issue of *The Army Lawyer*.

The location for the Nashville, Tennessee, On-Site, 4-5 April 92, has been selected. The on-site will be held at the Holiday Inn Crowne Plaza, 623 Union Street, Nashville, Tennessee. All other information regarding this on-site remains the same.

Update for the San Juan, Puerto Rico On-Site, 19-21 May 92: The 169th JAG Detachment will be the host unit. Also, the action officer is Major Winston Vidal. His address is Suite 1000, Fomento Building, 268 Ponce de Leon, Hato Rey, Puerto Rico 00918. You may reach him at (809) 753-8224.

CLE News

1. Resident Course Quotas

The Judge Advocate General's School restricts attendance at resident CLE courses to those who have received allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Personnel may obtain quota allocations from local training offices, which receive them from the MACOMs. Reservists obtain quotas through their unit or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel should request quotas through their units.

The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: autovon 274-7115, extension 307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1991

7-11 October: 1991 JAG Annual Continuing Legal Education Workshop.

15 October-20 December: 126th Basic Course (5-27-C20).

21-25 October: 108th Senior Officers Legal Orientation (5F-F1).

21-25 October: 9th Federal Litigation Course (5F-F29).

28 October-1 November: 49th Law of War Workshop (5F-F42).

28 October-1 November: 29th Legal Assistance Course (5F-F23).

4-8 November: 27th Criminal Trial Advocacy Course (5F-F32).

12-15 November: 5th Procurement Fraud Course (5F-F36).

18-22 November: 33d Fiscal Law Course (5F-F12).

2-6 December: 11th Operational Law Seminar (5F-F47).

9-13 December: 40th Federal Labor Relations Course (5F-F22).

1992

6-10 January: 109th Senior Officers Legal Orientation (5F-F1).

13-17 January: 1992 Government Contract Law Symposium (5F-F11).

21 January-27 March: 127th Basic Course (5-27-C20).

3-7 February: 28th Criminal Trial Advocacy Course (5F-F32).

10-14 February: 110th Senior Officers Legal Orientation (5F-F1).

24 February-6 March: 126th Contract Attorneys Course (5F-F10).

9-13 March: 30th Legal Assistance Course (5F-F23).

16-20 March: 50th Law of War Workshop (5F-F42).

23-27 March: 16th Administrative Law for Military Installations Course (5F-F24).

30 March-3 April: 6th Government Materiel Acquisition Course (5F-F17).

6-10 April: 111th Senior Officers Legal Orientation (5F-F1).

13-17 April: 12th Operational Law Seminar (5F-F47).

13-17 April: 3d Law for Legal NCO's Course (512-71D/E/20/30).

21-24 April: Reserve Component Judge Advocate Workshop (5F-F56).

27 April-8 May: 127th Contract Attorneys Course (5F-F10).

18-22 May: 34th Fiscal Law Course (5F-F12).

18-22 May: 41st Federal Labor Relations Course (5F-F22).

18 May-5 June: 35th Military Judge Course (5F-F33).

1-5 June: 112th Senior Officers Legal Orientation (5F-F1).

8-10 June: 8th SJA Spouses' Course (5F-F60).

8-12 June: 22d Staff Judge Advocate Course (5F-F52).

15-26 June: JATT Team Training (5F-F57).

15-26 June: JAOAC (Phase II) (5F-F55).

22-26 June: U.S. Army Claims Service Training Seminar.

6-10 July: 3d Legal Administrator's Course (7A-550A1).

8-10 July: 23d Methods of Instruction Course (5F-F70).

13-17 July: Professional Recruiting Training Seminar.

13-17 July: 4th STARC JA Mobilization and Training Workshop.

20 July-25 September: 128th Basic Course (5-27-C20).

20-31 July: 128th Contract Attorneys Course (5F-F10).

3 August-14 May 93: 41st Graduate Course (5-27-C22).

3-7 August: 51st Law of War Workshop (5F-F42).

10-14 August: 16th Criminal Law New Developments Course (5F-F35).

17-21 August: 3d Senior Legal NCO Management Course (512-71D/E/40/50).

24-28 August: 113th Senior Officers Legal Orientation (5F-F1).

31 August-4 September: 13th Operational Law Seminar (5F-F47).

14-18 September: 9th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

December 1991

3-6: ESI, Negotiation Strategies and Techniques, Denver, CO.

3-6: ESI, Managing ADP/T Projects, Washington, D.C.

4-6: ESI, International Contracting, Arlington, VA.

5-6: ABA, International Banking, New York, NY.

6: ABICLE, Negotiation, Birmingham, AL.

6: UMC, Charitable Tax and Estate Planning Strategies, Columbia, MO.

7: UMC, Charitable Tax and Estate Planning Strategies, St. Louis, MO.

8-13: AAJE, Judicial Independence, Separation of Powers, Roles of a Judge and Judicial Liability, San Juan, P.R.

8-13: AAJE, Comparative Law, San Juan, P.R.

9-13: ESI, Operating Practices in Contract Administration, Arlington, VA.

10-13: ESI, Competitive Proposals Contracting, San Francisco, CA.

11: ABICLE, New Alabama Rules of Professional Conduct, Huntsville, AL.

12: ABICLE, New Alabama Rules of Professional Conduct, Birmingham, AL.

12: ABICLE, Alabama Update, Mobile, AL.

13: ABICLE, Alabama Update, Montgomery, AL.

13: ABICLE, Estate Planning, Birmingham, AL.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1991 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Requirement
Alabama	31 January annually
Arizona	15 July annually
Arkansas	30 June annually
California	36 hours over 3 years
Colorado	Anytime within three-year period
Delaware	31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	June 30 annually of course
Louisiana	31 January annually
Michigan	31 March annually
Minnesota	30 August every third year
Mississippi	31 December annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Mexico	30 days after program
North Carolina	28 February of succeeding year
North Dakota	31 July annually
Ohio	Every two years by 31 January
Oklahoma	15 February annually
Oregon	Date of birth—new admittees and reinstated members report an initial one-year period, thereafter, once every three years
South Carolina	15 January annually
Tennessee	1 March annually
Texas	Last day of birthmonth annually
Utah	31 December of 2d year of admission
Vermont	15 July every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June every other year
Wisconsin	20 January every other year
Wyoming	30 January annually

For addresses and detailed information, see the July 1991 issue of *The Army Lawyer.*

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. However, because outside distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide publications to individual requestors.

To provide another avenue of availability, the Defense Technical Information Center (DTIC) makes some of this material available to government users. An office may obtain this material in two ways. The first way is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. Practitioners may request the necessary information and forms to become registered as a user from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (703) 274-7633, autovon 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. DTIC will provide information concerning this procedure when a practitioner submits a request for user status.

DTIC provides users with biweekly and cumulative indices. DTIC classifies these indices as a single confidential document, and mails them only to those DTIC users whose organizations have a facility clearance. This practice does not affect the ability of organizations to become DTIC users, nor does it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified, and *The Army Lawyer* regularly publishes the relevant ordering information, such as DTIC numbers and titles.

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC; users must cite them when ordering publications.

Contract Law

AD A229148	Government Contract Law Deskbook Vol 1/ADK-CAC-1-90-1 (194 pgs).
AD A229149	Government Contract Law Deskbook, Vol 2/ADK-CAC-1-90-2 (213 pgs).
AD B144679	Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128	USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
AD B136218	Legal Assistance Office Administration Guide/JAGS-ADA-89-1 (195 pgs).
AD B135492	Legal Assistance Consumer Law Guide /JAGS-ADA-89-3 (609 pgs).
AD B141421	Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).
AD B147096	Legal Assistance Guide: Office Directory/ JA-267-90 (178 pgs).
AD A226159	Model Tax Assistance Program/JA-275-90 (101 pgs).
AD B147389	Legal Assistance Guide: Notarial/ JA-268-90 (134 pgs).
AD B147390	Legal Assistance Guide: Real Property/ JA-261-90 (294 pgs).
AD A228272	Legal Assistance: Preventive Law Series/ JA-276-90 (200 pgs).
AD A229781	Legal Assistance Guide: Family Law/ ACIL-ST-263-90 (711 pgs).
AD A230991	Legal Assistance Guide: Wills/JA-262-90 (488 pgs).
AD A230618	Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-91 (73 pgs).
*AD B156056	Legal Assistance: Living Wills Guide/ JA-273-91 (171 pgs).

Administrative and Civil Law

AD B139524	Government Information Practices/JAGS-ADA-89-6 (416 pgs).
AD B139522	Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).
AD A199644	The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.
*AD A236663	Reports of Survey and Line of Duty Determinations/JA 231-91 (91 pgs).
*AD A237433	AR 15-6 Investigations: Programmed Instruction/JA-281-91R (50 pgs).

Labor Law

AD B145705	Law of Federal Employment/ACIL-ST-210-90 (458 pgs).
*AD A236851	The Law of Federal Labor-Management Relations/JA-211-91 (487 pgs).

Developments, Doctrine & Literature

AD B124193	Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212	Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).
AD B135506	Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).
AD B137070	Criminal Law, Unauthorized Absences/ JAGS-ADC-89-3 (87 pgs).
AD B140529	Criminal Law, Nonjudicial Punishment/ JAGS-ADC-89-4 (43 pgs).
*AD A236860	Senior Officers Legal Orientation/JA 320-91 (254 pgs).
*AD B140543L	Trial Counsel & Defense Counsel Handbook/JA 310-91 (448 pgs).
AD A233621	United States Attorney Prosecutors/ JA-338-91 (331 pgs).

Reserve Affairs

AD B136361	Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pams, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Their address is:

Commander
U.S. Army Publications Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.

(*2*) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*4*) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraph] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the Baltimore USAPDC at (301) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. This office may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. *New publications and changes to existing publications.*

Number	Title	Date
AR 350-17	Noncommissioned Officer Development Program	31 May 91
CIR 11-91-2	Internal Control Review Checklists	12 Jul 91
CIR 700-91-1	Sets, Kits, and Outfits (SKO) Management Procedure and Guidance	1 Apr 91
PAM 25-2	Information Mission Area Planning Process	30 Apr 91
Pam 40-578	Health Risk Assessment Guidance for the Installation Restoration Program and Formerly Used Sites	25 Feb 91
Pam 351-20	Army Correspondence Course Program Catalog	1 Apr 91
Pam 700-30	Logistics, Interim Change 101	15 May 91
	DOD Annual Index, Change 1	30 Apr 91
	Pay Manual, Change 23	18 Jan 91

3. OTJAG Bulletin Board System.

a. Numerous TJAGSA publications are available on the OTJAG Bulletin Board System (OTJAG BBS). Users can sign on the OTJAG BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and will then instruct them that they can use the OTJAG BBS after they receive membership confirmation, which takes approximately forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the OTJAG BBS. Following are instructions for downloading publications and a list of TJAGSA publications that currently are available on the OTJAG BBS. The TJAGSA Literature and Publications Office welcomes suggestions that would make accessing, downloading, printing, and distributing OTJAG BBS publications easier and more efficient. Please send suggestions to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

b. *Instructions for Downloading Files From the OTJAG Bulletin Board System.*

(1) Log-on to the OTJAG BBS using ENABLE and the communications parameters listed in subparagraph a above.

(2) If you never have downloaded files before, you will need the file decompression program that the OTJAG BBS uses to facilitate rapid transfer of files over the phone lines. This program is known as the PKZIP utility. To download it onto your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12].

(c) Once you have joined the Automation Conference, enter [d] to Download a file.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. From this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(g) The menu then will ask for a file name. Enter [c:\pkz110.exe].

(h) The OTJAG BBS and your computer will take over from here. Downloading the file takes about twenty minutes. Your computer will beep when file transfer is

complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off of the OTJAG BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C> prompt. The PKZIP utility then will execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKZIP utility program.

(3) To download a file, after logging on to the OTJAG BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c below.

(c) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the OTJAG BBS responds with the time and size data, type F10. From the top-line menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(e) When asked to enter a filename, enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. When you hear a beep, file transfer is complete, and the file you downloaded will have been saved on your hard drive.

(g) After file transfer is complete, log-off of the OTJAG BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not a compressed, you can use it on ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the OTJAG BBS). The PKZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "xxxxx.DOC" by following the instructions in paragraph 4(a) above.

c. *TJAGSA Publications available through the OTJAG BBS.* Below is a list of publications available through the OTJAG BBS. The file names and descriptions appearing in bold print denote new or updated publications. All active Army JAG offices, and all Reserve and National Guard organizations having computer telecommunications capabilities, should download desired publications from the OTJAG BBS using the instructions in paragraphs a and b above. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having a bona fide military need for these publications, may request computer diskettes containing the publications listed below from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781. Requests must be accompanied by one 5¼-inch or 3½-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

Filename	Title
121CAC.ZIP	The April 1990 Contract Law Deskbook from the 121st Contract Attorneys Course
1990YIR.ZIP	1990 Contract Law Year in Review in ASCII format. It was originally provided at the 1991 Government Contract Law Symposium at TJAGSA
330XALL.ZIP	JA 330, Nonjudicial Punishment Programmed Instruction, TJAGSA Criminal Law Division
505-1.ZIP	**TJAGSA Contract Law Deskbook, Vol. 1, May 1991**
505-2.ZIP	**TJAGSA Contract Law Deskbook, Vol. 2, May 1991**
506.ZIP	**TJAGSA Fiscal Law Deskbook, May 1991**
ALAW.ZIP	Army Lawyer and Military Law Review Database in ENABLE 2.15. Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF
CCLR.ZIP	Contract Claims, Litigation, & Remedies
FISCALBK.ZIP	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA

FISCALBK.ZIP	May 1990 Fiscal Law Course Deskbook in ASCII format
JA200A.ZIP	Defensive Federal Litigation 1
JA200B.ZIP	Defensive Federal Litigation 2
JA210A.ZIP	Law of Federal Employment 1
JA210B.ZIP	Law of Federal Employment 2
JA231.ZIP	Reports of Survey & Line of Duty Determinations Programmed Instruction.
JA235.ZIP	Government Information Practices
JA240PT1.ZIP	Claims—Programmed Text 1
JA240PT2.ZIP	Claims—Programmed Text 2
JA241.ZIP	Federal Tort Claims Act
JA260.ZIP	Soldiers' & Sailors' Civil Relief Act
JA261.ZIP	Legal Assistance Real Property Guide
JA262.ZIP	Legal Assistance Wills Guide
JA263A.ZIP	Legal Assistance Family Law 1
JA265A.ZIP	Legal Assistance Consumer Law Guide 1
JA265B.ZIP	Legal Assistance Consumer Law Guide 2
JA265C.ZIP	Legal Assistance Consumer Law Guide 3
JA266.ZIP	Legal Assistance Attorney's Federal Income Tax Supplement
JA267.ZIP	Army Legal Assistance Information Directory
JA268.ZIP	Legal Assistance Notorial Guide
JA269.ZIP	Federal Tax Information Series
JA271.ZIP	Legal Assistance Office Administration
JA272.ZIP	Legal Assistance Deployment Guide
JA281.ZIP	AR 15-6 Investigations
JA285A.ZIP	Senior Officer's Legal Orientation 1
JA285B.ZIP	Senior Officer's Legal Orientation 2
JA290.ZIP	Administrative & Civil Law Handbook 1
JA296B.ZIP	Administrative & Civil Law Handbook 2
JA296C.ZIP	Administrative & Civil Law Handbook 3
JA296D.ZIP	Administrative & Civil Law Deskbook 4
JA296F.ARC	Administrative & Civil Law Deskbook 6
YIR89.ZIP	Contract Law Year in Review—1989

4. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@agjags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crankc(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via autovon should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

d. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System.

With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are autovon 274-7115 ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

6. Literature and Publications Office Item.

The School currently has a large inventory of back issues of *The Army Lawyer* and the *Military Law Review.* Practitioners who desire back issues of either of these publications should send a request to Ms. Eva Skinner, JAGS-DDL, The Judge Advocate General's School, Charlottesville, VA 22903-1781. Not all issues are available and some are in limited quantities. Accordingly, we will fill requests in the order that they arrive by mail.

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:

PATRICIA P. HICKERSON
Colonel, United States Army
The Adjutant General

Distribution: Special

Department of the Army
The Judge Advocate General's School
US Army
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